This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

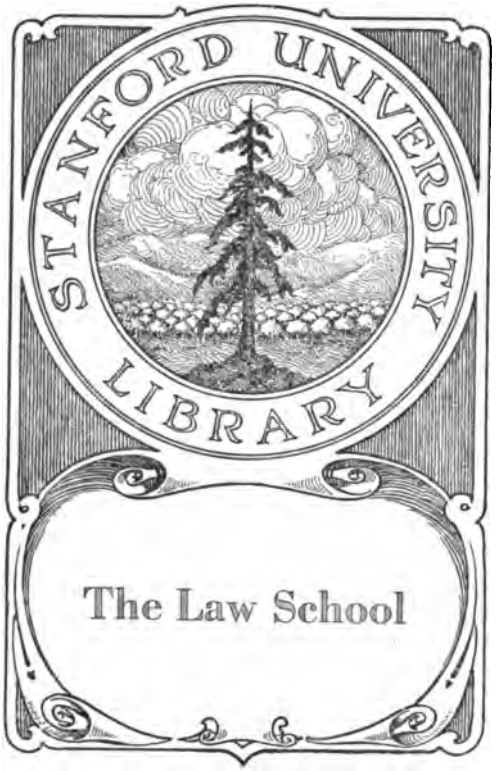
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`


STANFORD UNIVERSITY
LIBRARY
The Law School

LBC
JBV
YP
v.2

Edwin A. Abbot.
Milwaukee
Wis—

SUPPLEMENT

TO THE

DICTIONARY OF THE DECISIONS

OF

THE COURT OF SESSION.

By M. P. BROWN, Esq. Advocate.

STANFORD LIBRARY

VOLUME II.

CONTAINING DECISIONS REPORTED BY

HARCARSE, STAIR, AND FOUNTAINHALL.

EDINBURGH:

PRINTED FOR W. & C. TAIT, 78, PRINCE'S STREET.

MDCCCXXVI.

365869

STANFORD LIBRARY

DECISIONS

OF THE

LORDS OF COUNCIL AND SESSION,

REPORTED BY

SIR ROGER HOG OF HARCARSE.

——— *against* ———.

One having disponed his goods to his niece, providing she would marry with consent of two friends named in the disposition; and, that if she married without their consent, the right should go to another: it fell out that she married without consent of these friends, upon which the disposition in her favours was craved to be annulled. Answered, That she endeavoured to carry the friend's consent to her marriage; but they unreasonably refused to approve of her choice, which was rational, though they could make no objection against the man's person or fortune: and, if an uncontrolled power to dissent, without giving a reason, should be allowed to such trustees, they would always force the parties to a composition. The Lords found it relevant to annul the disposition, that the receiver married without consent of the person therein-mentioned; but found the answer also relevant to elide the irritancy, that she required the persons, by whose advice she was appointed to marry, to give their consent, and they refused to give a reason for their dissent.

Page 26, No. 130.

1672. *June* 21. SANDILANDS *against* the EARL of HADDINGTOUN.

A PIECE of land, which was a part of the barony of Torphichen, and astricted to that mill by a bond of thirlage, being acquired by the Lord Haddingtoun, and disponed to Coustoun, *cum molendinis*, &c. in the *tenendas*, and with absolute general warrandice; and Couston being distressed, recurred upon the warrandice;—the Lords found, That, although the clause *cum molendinis*, &c. in the *tenendas*, might empower the buyer to build a mill, and would exeem him, if the disponer had right to the mill of the barony to which it was anciently astricted, yet, seeing the buyer could not but suppose, that these lands, as all lands, were astricted to the mill of the barony, (to which the disponer had no right,) and did not in the warrandice specially provide against the astriction; the Lords found it did not fall under the general warrandice.

Page 294, No. 1.

1672. *December.* BANDONER *against* COLLIER.

ONE Mr Bandoner being infeft in the mill of a barony by the abbot of Culross, with the multures and astrictions thereto belonging in general, without the words, *omnium bonorum crescentium in terris*, &c. pursued one Collier for the abstracted multures of barley. Alleged for the pursuer, That the defender being thus astricted, and having no clause *cum molendinis* in his infeftment, use of coming to the mill with any corn, as oats, was sufficient to save the prescription of liberty for the barley, although they were not able to prove that barley came, or that there were abstracted multures recovered for barley, this being the mill of the barony. The Lords generally inclined to think, that, astriction being only general, and not *omnium granorum*, &c. the possession of grinding oats was not enough to prove the use of grinding barley and other grain; although it were enough if the astriction was *omnium granorum crescentium in terris* of the lands astricted; as was found in Waughton's case, June 26, 1635, —December 1672. The like in Oliphant of Condy against Oliphant of Rossy, July 4, 1673, where the defender, by his charter, was astricted to bring *omnia grana crescentia, semine et decimis exceptis.*

Page 294, No. 2.

1673. *June* 10. LADY STRATHNAVER *against* RENTON of BILLIE.

FOUND that inhibition did interrupt tacit relocation, so as the intermitter with the teinds would be liable for a fifth of the rent for all years after the inhibition; and found that the defender having, as tacksman, intromitted with, or led any

HARCARSE.

1681. *November.* LORD ST ANDREW'S *against* SIMSON.

A FIRST adjudication, upon an apparent heir's renunciation, was ordained to be seen by a con-creditor, and not allowed to pass summarily.

Page 1, No. 1.

1681. *November.* THOMAS ALLAN and DRYSDALE *against* ROBERT ALLAN.

A BOND, whereby a father obliged himself to dispone a parcel of lands to his youngest son *in familia*, being delivered to a friend, was found not alterable; there being no such power reserved.

Page 37, No. 166.

1681. *November.* CHARLES HAMILTON *against* JAMES STUART of WELLS.

A DISCHARGE obtruded against a bond for 8000 merks being lost, the Lords ordained witnesses to be examined, *ex officio*, concerning the verity of the discharge; although it was contended that it could only be made up by a proving the tenor. *Vide* No. 169, [Mercer against Adie, 15th December 1681;] and No. 644, [Gordon against Forbes, February 1682.]

Page 37, No. 167.

1681. *November* 17. BALMADIES and his LADY *against* NISBET of CRAIGENTINNIE.

A CREDITOR having restricted his debt, in case the remainder were precisely paid at a certain term, and having, after elapsing of the term, pursued for the whole;—the Lords found the failyie purgeable by present payment, if the cause of the restriction was onerous, but not if it was not onerous.—*Vide* No. 1030, Dryburgh against Creditors, 24th November 1686.

Page 37, No. 168.

1681. *November* 19. FLETCHER *against* ———.

FOR proving the date and delivery of a holograph discharge of annual-rent, produced for clothing a base infeftment with possession, *in anno* 1664, in a com-

petition with a public infeftment in the year 1668, the debtor, receiver of the discharge, and the creditor who granted it, having acknowledged the date upon oath, and a witness having deponed that he heard the creditor say he was going to grant a discharge about that date, but knew not for what;—the Lords preferred the annual-renter.

Page 162, No. 582.

1681. *November* 23. JOHN AITCHISON *against* SIR PATRICK THREAPLAND.

SIR Patrick Threapland having desired, by his letter, another's creditor to set his debtor out of prison, and promised to keep him, the debtor, in mind to pay at the day; and, if he failed, that himself should pay the debt; upon an assignation, after the day, (no payment being made,) Sir Patrick was pursued as expromissor, and decerned to pay the debt; although it was Alleged, That the pursuer had not, as he ought to have done, given notice, *debito tempore*, after the day, till now that the debtor was bankrupt.

Page 56, No. 235.

1681. *November* 8. SIR MICHAEL NESMITH of POSSO *against* His SON, young Posso.

SIR Michael Nesmith's agent having used an order of redemption of an apprising, the instrument of premonition bore, That the procurator's power was sufficiently known to the notary; but the procuratory not being produced to the compriser, upon his requiring a sight thereof, he took instruments in the hands of another notary, that there was no procuratory; and the pretended procurator declared, himself, *ex post facto*, that he had none;—The Lords found, that a *negotiorum gestor* could not use the order of redemption, without a procuratory, and a ratihabition was not sufficient; and so found the order null, though thereby the apprising would be expired.

Page 64, No. 269.

1681. *November* 29. GEORGE HERIOT *against* CAPTAIN BAIRD.

A TEN years' tack being registrat in July 1681, and the tacksman being charged for the rent 1680, and a caption got out in September 1681; the tacksman, while under caption, gave a disposition of his whole corns, goods and gear, for the rests of the crop 1680, and also for payment of the rent 1681, though the term of payment was not come, and containing an obligement to find caution for the rents of all years during the tack, although the tack contained no such obligement. This disposition being questioned as to the two last oblige-

part of the teind before inhibition, he might lead the rest of it after the inhibition; and, for that year, the relocation was not interrupted, unless it were alleged that the tacksman did, *dolose*, lead the said part before the usual time of leading, thereby to prevent the inhibition. And if *dolus* were proven, the intromitter would be liable in a spuilyie; otherwise only for the tack-duty.

Page 295, No. 8.

1674. *February* 3. BLAIR *against* the PARISHIONERS of KINGARTH.

KINCATTEN, having a tack of the pasturage-teinds from one of the prebends of the chapel-royal of Stirling, being pursued for the vicarage, excepts, that he had been in possession for many years to lift the vicarage, as a pendicle of the parsonage-teinds, and that it was the custom of the prebendary. Which the Lords found relevant, although vicarage was not expressed in the tack. This practique is not in Stair.

Page 295, No. 9.

1676. *January* 14. the ABBOT of KINROSS *against* the FEUAR of KINROSS.

THE Abbot of Kinross, having feued out some lands of the abbacy for a feu-duty *pro omni alio onere, exactione*, &c. and with a clause *cum molendinis et multuris* in the *tenendas*, but not in the dispositive clause; and the feuar being pursued for abstracting multures, by the abbot's successor in the mill, who had got the mill long after the foresaid feu;—the Lords found the feuar free from astriction, by reason of the said charter.

Page 294, No. 4.

1678. *February*. SIR ADAM ——— *against* the LAIRD of ROBERTLAND.

ROBERTLAND,—having a tack of the teinds of his barony, lying in the parish of Stuarton, disponed a part of the said barony, with all right, title, and interest he had to the teinds of the said lands, and assigned the tack of teinds as to the lands disponed; and the disposition acknowledges, that there was a full price paid for lands and teinds;—warrants the teinds from fact and deed only. And there being a locality due to the minister out of the whole barony in general, which, for many years after the disposition, was wholly paid by Robertland, and his tenants in the lands not disponed; and the minister having thereafter distressed Sir Adam's tenants, Sir Adam intented declarator, that Robertland should relieve the lands disponed, of the payment of any part of the stipend,

there having been a full price paid for the teinds; and which the Lords declared; although it was alleged for the defender, that he disponed all interest he had in the teinds, and with warrandice from fact and deed. But the Lords laid weight on the freedom the pursuer had all the years past, which cleared the meaning of parties. And here the defender had taken a right of apprising against the whole barony, led against his predecessor his brother, reserving Sir Adam's right. And here the apprising was yet in the person of the defender-disponer; and so accresced.

Page 295, No. 10.

1679. *January* 15. GRIERSON of CHAPPEL *against* GORDON of SPADOCH.

THE Abbot of Halywood having disponed a piece of land-feu, with a mill that was on it, and the sequels, *reddendo* five merks, and the multures of the lands feued;—it was alleged against an action of abstraction, 1. The word *sequels* implies the multures, and the clause in the *reddendo* of multures is inconsistent, and seems an error. 2. The mill to which the pursuer would have the defender's lands astricted, is not within the barony and abbacy; and the mill of the barony and abbacy being ruinous, the defender might grind his corns where he pleased. The Lords repelled the first defence, in respect of the quality of astriction in the *reddendo*, and found the disposition of the mill was only for outsucken multure, and did not extend to the lands feued; but found the second defence relevant, That the mill was not in the barony, unless he would prove that the defender had been in use to come to the said mill, though without the barony, for the space of forty years.

Page 294, No. 5.

1680. *November* 26. ——— *against* JAMES ALEXANDER of KINGLASSIE.

THE wife of Mr James Alexander of Kinglassie, advocate, being cited, and himself by name designed only her husband;—alleged for the defenders, That, by the Act 6, Sess. 2, Parl. 2, Charles II, all pursuers and defenders ought to be named and designed in the execution; and a man's designation ought not to be drawn from his wife. The Lords, being informed that the process was malicious, at the wife's mother's instance, and that the affair would be amicably taken away, they cast the summons for that impertinent designation.

Page 255, No. 907.

---

ments as done *ex vi et metu*, when he was under caption, and that this obligement was not the ground of the caption, but only the rent 1680;—the Lords reduced the disposition as to these obligements, *ex capite vis et metus*.

Page 54, No. 228.

1681. *December.* FLOCKART *against* LORD ROLLO.

MY Lord Rollo, being pursued as vitious intromittor with his father's robes and best horse, at the riding of the Parliament;—he Alleged, That the goods intromitted with fell under escheat by his father's dying at the horning, and the said escheat was gifted, and declared, before commencing of the cause; which ought to purge the vitiosity, though the gift was posterior to the defender's intromission, and he derived no right from the donator. The Lords sustained the allegeance, as relevant to purge the passive title.

Page 6, No. 26.

1681. *December.* ——— *against* DR HAY, and CAMPBELL *against* CAMPBELL.

FOUND, That, in the case of three brothers, the second and not the eldest succeeds both as heir of line and conquest.

Page 7, No. 32.

1681. *December.* JOHN GEDDY *against* PATRICK TELFER.

AN adjudication against one Geddy, that was out of the kingdom, being quarrelled as null, for that the citation in the summons was not given upon sixty days at the market-cross of Edinburgh and pier of Leith;—it was Alleged for the adjudger, That the debtor had ratified the decreet of adjudication, and so had passed from an informality or nullity therein. Answered, The adjudger gave a back-bond, the time of the said ratification, to allow all things to the debtor that could be acclaimed by law, reason, or equity, which took off the total effect of the ratification. 1. The Lords sustained the ratification to make the adjudication subsist; but that the effect of the said ratification was elided and taken off by the back-bond. 2*do*. The said adjudication was alleged to be null, for that it adjudged for a fifth part more than was due, which was *pluris petitio*. Answered, The adjudger had libelled a fifth part more, not knowing but the debtor might have appeared and produced a progress; in which case, the Act of Parliament allows to adjudge for an additional fifth part; and the clerks, at the beginning, before the import of the Act was well understood, used to extract for the superplus fifth part, even in absence. 2. The Lords, in respect of the clerk's mistake, did not find the adjudication simply null, but restricted it to the principal annual-rent and composition to the superior, without allowing

accumulations, or any expenses of leading the adjudication: and in this they had respect to the voluntary ratification above mentioned, which would have made the adjudication subsist to all effects, had it not been for the adjudger's back-bond. *Page* 64, No. 270.

1681. *December.* ROBERTSON *against* SIR PATRICK NISBET.

FOUND, That Sir Patrick Nisbet having given his vassal a feu-charter of some lands, with pertinents, for a feu-duty *pro omni alio onere;* the vassal might erect a brewery *in suo feudo,* though in barony, and the clause *cum breueriis,* was not insert in the charter; which, in Craig's opinion, page 181, passes with the feu, though not expressed. *Page* 162, No. 584.

1681. *December.* ROBERT SPEED *against* JOHN SPEED.

A PERSON being infeft by cognition, and hasp and staple, in a tenement of land in Brechin, and his sasine not registrat,—as if the tenement had been burgage, whereas it truly held feu of the bishop, and was only granted to the town during the suppression of prelacy,—he disponed the tenement; the disponer's son served heir to his grandfather, and raised reduction of his father's infeftment, as null, for not being expede *habili modo* by charter and sasine, upon retour or precept of *clare constat,* as other feus are acquired, nor yet registrat. The Lords found the father's infeftment null.

Index. Infeftment without registration, taken in feu-lands by cognition and hasp and staple, *ex errore,* as if they had been burgage, and not by charter and sasine, upon retour and precept of *clare,* found null. *Page* 164, No. 591.

1681. *December.* The LAIRD of CRAIGIVAR *against* JAMES SCOT.

THE defender, in a process of spuilyie, dying before litiscontestation, and decreet being extracted without any such objection made by his procurators, and his lands apprised thereon,—the Lords reduced the apprising as simply null, at the instance of another of the defunct's creditors, who had used posterior real diligence; and would not sustain it as a security for the sum that should be instructed to be due, otherwise than by not denying the libel.

Page 173, No. 629.

1681. *December.* DONNES *against* LISLE.

ALEXANDER Donne having died infeft in a tenement in the year 1658, his son, the apparent heir, continued in possession till 1663; after this Lisle entered up-

on a right from one Buse, and died infeft; and the heirs of Donne having got into possession, Lisle's heir recovered decreet of removing, of whose right the Donnes pursued a reduction *in anno* 1679. Alleged for the defenders, *Minor non tenetur placitare.* Answered, Alexander Donne, the pursuer's author, died in possession, and the defender provoked to judgment by the removing. The Lords sustained the answer.

Page 197, No. 698.

1681. *December* 1. GORDON *against* ROBERT BURNET.

A DISPOSITION of moveables, and sums of money on death, though to a conjunct person, a son-in-law, sustained to purge the passive title of vitious intromission.

Page 10, No. 43.

1681, *Dec.* 2; *and* 1682, *Jan.* 27. JOHNSTON *against* MELVIL.

AN adjudication against three sisters, heirs-portioners, whereof two renounced to be heir, found null as to the third of the sisters not renouncing, and restricted to the debt in the decreet *cognitionis causa;* as to which it was sustained; but, thereafter, January 27, 1682, the Lords sustained it only as a real security for the principal sum, annual-rent, and necessary expenses, and not for accumulations; and found, that it could not expire, though no order were used.

Page 1, No. 2.

1681. *December* 3. DALGARNO *against* URQUHART.

A SON forisfamiliated being pursued as vitious intromittor with his father's goods, his defence was, that he entered in possession of the goods only *custodiæ causa,* and got himself clothed with a gift of his father's escheat in a month after; which the Lords sustained in respect of the defender's great diligence to procure the gift.

Page 6, No. 25.

1681. *December* 3. SIR DAVID OGILVY *against* OGILVY of LOGIE.

A WRITTEN citation, before a baron court, to pay the rents contained in the pursuer's disposition and assignation, found to be a formal intimation, and sufficient to exclude a posterior arrester of the rents assigned; and the assignee's intimating judicially the said assignation in the baron court, and producing the same to the clerk in court, was sufficient intimation.

Page 18, No. 96.

1681. *December* 15. GRIZEL MOIR *against* The LORD and MASTER of BALMERINOCH.

THE Lords inclined to think, that, in the case of a sum bearing annual-rent arrested, all posterior annual-rents fell under the arrestment by way of accession; but here the debtor was only debating, and not a co-creditor who had [arrested] these annual-rents that fell due after the first arrestment; whose case had been more doubtful.

Page 14, No. 75.

1681. *December* 22. SIR WILLIAM BINNING *against* MAXWELL of CALDERWOOD.

FOUND that a bond, bearing annual-rent assigned, doth not fall under the assignee's single escheat, and is not like a liferent assigned, which falls in the assignee's single escheat, because the *jus* of the liferent remains with the liferenter, and only the profits go to the assignee.

Page 113, No. 425.

1682. *January*. The LAIRD of LANGTOUN *against* The EARL of HUME.

A CLAUSE of assignation to teinds, in farther security of the payment of a sum in a bond, without any obligement to do diligence on the assignation, was not found to oblige the creditor to do diligence thereon.

Page 18, No. 97.

1682. *January*. ELPHISTON *against* LORD CRANSTON.

A BOND sustained as probative, being special in the date as to the month and day, without mention of the year, and no blank left for it; but this bond related to a former bond which had a full date, and the pursuer was content to hold it of that year, or any year before the pursuit.

Page 38, No. 170.

1682. *January*. SIR ADAM BLAIR *against* LADY CARBERRY, RIGG'S WIFE.

WILLIAM Rigg having infeft his wife in a liferent of an infeftment of annual-rent for 35,000 merks, out of his debtor's lands, and thereafter the debtor having paid 5000 merks of the sum upon the husband's discharge, and become cautioner for him in 5000 merks more; the liferenter, after her husband's decease, offered to

poind the ground for the annual-rent of the whole 35,000 merks: The debtor proponed compensation *quoad* the annual-rent of the sum advanced, and of that for which he was cautioner for the creditor. The Lords found the real right was not compensable to the prejudice of the liferenter; for, as the husband could not have disponed the land but with the burden of the liferent, neither could he indirectly extinguish it by compensation.

Page 59, No. 252.

1682. *January.* VISCOUNT of STORMOUNT *against* BLAIR of KINFARONS.

FOUND that the superior, being liable for the feu-duty of the erection to the exchequer, *viz.* £20; and several parts of the lands being feued out, holding of the king for payment of an undetermined proportion of the feu-duty;—if the superior pay the whole, he may have recourse against any part of the lands of erection for the whole, and leave that vassal to seek his relief off the rest *pro rata.*

Page 264, No. 938.

1682. *January* 6. GRANT *against* GRANT.

ONE being pursued as heir to a person who had vitiously intromitted with the goods of the pursuer's debtor,—the Lords found, that action for vitious intromission, being penal, *non transit in hæredes,* where *lis* is not *contestata* with the intromittor in his lifetime; but found, that the pursuer might confirm himself executor-creditor to his debtor, and recover the goods intromitted with, if extant, or the value thereof, as accords.

Page 6, No. 27.

1682. *January* 13. GORDON of SEATON *against* ALEXANDER SYMSON.

FACTORS for merchants found liable for annual-rent, from the time that the constituent's goods produced money.

Page 194, No. 684.

1682. *January* 16. WILLIAM ORROK *against* ALEXANDER CHAPLAND.

AN apparent heir, pursued for his predecessor's debt, was not allowed to renounce till an apprising, led upon his own bond against the predecessor's estate, were purged; but the apprising, not being to the apparent heir's behoof, did not infer an universal passive title.

Page 7, No. 28.

1682. *February.* SHED *against* SIR PATRICK NISBET.

ONE Shed having inserted his creditor Sir Patrick Nisbet's name in a blank bond due by one Scot, without taking a back-bond,—some years after, Sir Patrick pursued Shed. Alleged for the defender, That an assignation granted by a debtor, not bearing expressly in satisfaction, is presumed a corroborative security; but, when a creditor takes right to a bond, by getting his name inserted, that presumes satisfaction, unless the contrary be made appear. Which allegeance the Lords found relevant: but this is not *sine suo scrupulo*, Shed not having retired his bond.

Page 19, No. 99.

1682. *February.* SIR JOHN AYTON *against* The LAIRD of INNERNYTIE.

DAVID Stewart having assigned to Sir John Ayton, his brother-in-law, failing lawful issue of his own body, a 4000 merk bond due to him, the cedent, by the Laird of Innernytie his brother, with a provision, That it should be lawful to the cedent to uplift and dispose of the money; and a clause declaring the delivery of the assignation equivalent to the delivery of the bond, which was not then in his possession, but in the hands of Garntully his uncle: he thereafter called for the said assignation, and gave another of the foresaid tenor in lieu of it, with the burden of a thousand merks to be paid to a bastard brother, who, by David's order, three days before his death, burnt the first assignation. Sir John Ayton having raised, after David's death, an action for exhibition and delivery of the bond and assignation, it was alleged for Innernytie, That the assignation bore no clause dispensing with delivery. 2. It having been delivered as the clause imports, the recalling of it infers a revocation of the assignation. 3. It was offered to be proven by witnesses, that Ayton having desired David, when on death-bed, to give up the assignation and bond, he refused, at least gave no answer, but turned him about to the wall; and that he said to others, that the granting of the said assignation, which would have destroyed his father's family, troubled him more as any thing he ever did; but now he had recalled it, and had it in his own custody. Answered for the pursuer, Though there was no express clause dispensing with the delivery, yet,—the cedent having a rational cause for keeping the evident, *viz.* a reserved power to uplift the money, and the sum not simply assigned but tailyied to Ayton, failing heirs of David's body, who are instituted by being *in conditione positi*,—there was good reason for the assignation's remaining with the cedent till his death; and, though it bear delivery, that hath only been symbolical for want of the bond: so that the recalling of it could import no revocation; nor can the effect of writs be taken away by the depositions of extrinsic witnesses, especially as to words omitted long after signing. And the Lords, in the case of Thomas Kincaid against Stark, December 11, 1679, sustained a disposition of lands, reserving a liferent and power to alter, though it had no cause of disposing, &c.; and, if David had inclined to alter, he would have destroyed the second, as well as the first bond. Replied, The assignation, by its conception, is a present right,

though with a resolutive condition, in case of children. This plea was agreed and taken up before interlocutor.

Page 19, No. 100.

1682. *February.* The CREDITORS of the ESTATE of FRENDRAUGHT *against* the VISCOUNT and BOGNY.

THE Viscount of Frendraught, in order to acquire from one Gregory an expired apprising of his predecessor's estate, and yet to evade the Act of Parliament about purchases made by apparent heirs, provided, in his contract of marriage with the Lady Rutherfoord, who had 20,000 merks of tocher heritably secured, that he should give her a jointure; and, by a separate writ, of the same date, renounced the tocher, and declared, that it should be employed on security for her and her children. The Lady and her friends, after the marriage, acquired Gregory's apprising in favours of a blank person, in which, after it had lain some months blank in the Viscount's custody, the name of Bogny, the Viscount's chamberlain, was filled up: who, by his back-bond, provided the lands to the Viscount and his lady in liferent, and to the bairns in the marriage in fee; which failing, to the Viscount's heirs and assignees. In a process against the present Viscount, (his father being dead,) for redeeming the apprising from him, upon payment of the sums truly paid for it;—the Lords found the conveyance fell under the Act of Parliament. *Vide* No. 341, [Marjoribanks' Creditors *against* Marjoribanks, February 1682.]

Page 25, No. 129.

1682. *February.* MONTGOMERY *against* HAY.

A BOND, bearing to be payable to a husband and his wife, (without mention of conjunct fee or liferent,) and the fee to the heirs of the marriage, was found to import a liferent to the wife.

Page 38, No. 172.

1682. *February.* SIR PATRICK HEPBURN *against* MARY BRUCE.

DOUGAL Macpherson having taken a bond, whereon infeftment followed, to himself in liferent, and his son in fee, with power to him, the father, to uplift and dispose of the money, without the son's consent,—which Dougal did afterwards discharge in favours of his son, who married, and died,—the son's relict, as creditor to her husband, to whom the father was liable by the warrandice in the discharge, having raised a process against the father, for declaring her husband's right to the bond, and inhibited him thereon; Dougal thereafter disponed the heritable bond to Sir John Falconer, for the value to be paid to Sir Patrick Hepburn, who, as creditor *ab ante* to the disponer, raised the reduction of the discharge upon the Act of Parliament, 1621; and the son's relict raised re-

duction of the disposition, *ex capite inhibitionis.* Alleged for the relict, That the reduction of the discharge would signify nothing; seeing, the faculty being personal, and not affected by diligence before Dougal's death, it is expired, though there were no discharge of it. Answered, The disposition was an exercise of the faculty, and made the fee Dougal's, so as it might be affected by his creditors. Replied, The disposition is reducible *ex capite inhibitionis,* as being made after the disponer stood inhibited at the instance of the son's relict; and the making the price payable to Sir Patrick Hepburn was a gratification against the Act of Parliament, 1621. Duplied, Though the inhibition should take off the effect of the disposition, yet the disposition was such an act and exercise of the faculty, as hindered it to expire by Dougal's death, as well as if he had uplifted the money, and paid it to Sir Patrick Hepburn. The Lords found the faculty was expired by Dougal's death, and not affectable after his death.

Page 38, No. 176.

1682. *February.* MURRAYS *against* MURRAY.

THOMAS Murray, late bailie of Edinburgh, having granted bonds of 7000 merks to each of his three daughters of the first marriage, in satisfaction of their portion natural, and what they could claim as nearest of kin to their father, which were paid at their respective marriages; and having afterwards granted bonds of 7000 merks also to each of his three daughters of the second marriage, expressly in satisfaction of legitime, &c. and by his testament having left all his six daughters universal legators, as the dead's part; the Lords, 16th July 1678, "found, That the bonds of provision to the children of the second mar-"riage, not being granted *in lecto,* were to be taken off the whole head of the "executry as a debt; and that the half of the free gear, after deduction of "these and other debts, belonged also to the bairns of the second marriage, "and the other half belonged to the bairns of both marriages equally, by the fa-"ther's legacy." It being afterwards found, upon probation, "that the bonds "of provision to the children of the second marriage were granted on deathbed;" the children of the second marriage pursued those of the first, for the half of their father's moveable estate, as due to them for their legitime, upon this ground, That the children of the first marriage were forisfamiliated; and claimed payment of their bonds of provision out of the other half, and that the superplus ought to be divided among the pursuers and defenders, conform to the universal legacy. Alleged for the children of the first marriage: Albeit bonds of provision, granted on deathbed, have only the effect of legacies, they must be imputed in satisfaction of the legitime due to the children of the second marriage, so as they cannot claim both the half of the goods as legitime, and seek the bonds of provision as legacies out of the other half as the dead's part; because, by the civil law, whatever was left by parents to their children, by testament or legacy, was always imputed in satisfaction of their legitime, as appears from the title *ff. de Inofficioso Testamento;* and the reason is, for that the legitime is given as a maintenance to unprovided children, which ceases when they get their portions, and *debitor non præsumitur donare:* but what was given by parents to their children *inter vivos,* was not imputed in the legitime, because parents in

liege poustie are in expectation to gain more means to provide their other unprovided children, which cannot be pretended where the provision is given *in ultima voluntate;* and yet, even in that case, if it appeared to be the father's will, that the same should be imputed in the legitime, it was allowed; *l. 25, si non mortis; ff. de Inofficioso Testamento.* 2. The children of the second marriage cannot seek the benefit of the bonds of provision, except likewise they allow the equal division made by the father in his testament; because the bonds of provision granted *in lecto* are in effect legacies, and the testament relates thereto, and both are, as it were, *unicus contextus,* and legacies cannot be craved by any that does not approve the testament, seeing *qui approbat non reprobat;* nor can the universal legacy be otherwise understood than so as to the superplus of the defunct's moveable estate, more than pays the debt and bonds of provision, ought to be divided equally among the children. Again, albeit the children of the first marriage were forisfamiliated by their provision, the renunciation of their legitime in favours of the father himself might be passed from by him, as he has done by making an equal division among all his children by the testament. Answered for the children of the second marriage: As the civil law differs from ours in many things, concerning the division and succession in moveables, so particularly in this, that any provision left to a child, on deathbed, cannot prejudge him of his legitime, unless expressly declared in satisfaction thereof; just as a legacy being left to a relict, without bearing in satisfaction of her terce, she will get both the legacy and terce; and if this be sustained in favours of a wife's terce, which is only introduced by our municipal law, much more ought it to hold in favours of a child's legitime, which is founded on the law of nature, as well as upon our law. The brocard *debitor non præsumitur* takes no place here; for the legitime is not the father's debt, but a legal interest arising to the children, by the division of the communion of goods at his death. And, albeit the father appoints the bonds of provision to be paid out of the first and readiest of his moveable estate, that can only be understood *in terminis juris,* and cannot prejudge the children of their legitime, which the father could not wrong by the testament; and, had the father's will been never so express that his moveable estate should be divided according to the bonds of provision and testament, it must be overruled by our law and practice, which contradicts such a method; so that the bonds of provision, having only the effect of legacies, cannot be imputed to the legitime of the children of the second marriage, but they ought to have the half of the father's moveable estates as their legitime, the children of the first marriage having discharged theirs; and the bonds of provision ought to affect the other half of the moveables, or the dead's part, as legacies. The Lords found, That, albeit the bonds of provision, granted *in lecto,* be of the nature of a legacy, and cannot prejudge the legitime; yet,—it being arbitrary to him to have granted the said bonds of provision, and having expressly declared that they should be paid out of the first and readiest of his goods and gear, and debts, which imports that the same should be satisfied before the division of the inventory,—they found, That the bairns of the second marriage, accepting of the bonds of provision, must take the same in the order and way of his their father's appointment: and therefore found, That the bonds of provision must deduce off the whole inventory, and that the one half of the surplus, after deduction of the debts and bonds of provision, belongs to the bairns of the

second marriage as their legitime; and the other half, being the defunct's part, belongs to the bairns of both marriages equally by the universal legacy.

Page 119, No. 443.

1682. *February.* JOHN NISBET *against* SIR DANIEL CARMICHAEL.

THOUGH apprising with infeftment, or a charge intervening between a base infeftment and the first term for payment of annual-rents, is preferable to the infeftment of annual-rent, yet a base annual-renter, who had done diligence for possession immediately after the term, was preferred to a comprising without a charge or infeftment.

Page 163, No. 568.

1682. *February.* ANDREW CASSY *against* WILKY.

IN an action at the instance of one Andrew Cassy against one Wilky, for damage incurred by the pursuer in the free use of his cellar in Edinburgh, occasioned by some rubbish of a house the defender was to rebuild there, conform to the town-council's appointment;—the Lords assoilyied from the action.

Page 254, No. 898.

1682. *February* 2. BOWER of KILMADRUM *against* The EARL of MARESCHAL.

AN apparent heir being pursued upon the passive title of *gestio pro hærede*, for having intromitted with some goods belonging to a defunct, which should be reputed moveable heirship, seeing that it is not the best, but any thing the apparent heir takes;—Alleged for the defender, That his intromission was by a warrant from the Lords of Session, empowering him to intromit and dispose of some plenishing for the behoof of creditors, and so was not vitious. 2. The defender was only heir of tailyie, and so had no right to heirship moveable, which falls to the heir of line. The Lords assoilyied the defender from the passive title. *Vide* No. 31, *inter eosdem*, (immediately below.)

Page 7, No. 30.

1682. *February* 2. BOWER of KILMADRUM *against* The EARL of MARESCHAL.

THE Lords found the title of nobility and office of marshall was annexed to the blood, and not *in commercio;* and that the using the title, and exercising the office of marshall, made no passive title.

Page 7, No. 31.

1682. *February* 9. ——————— *against* ———————.

THE Lords refused to sustain this as a qualification of circumvention in eliciting a bond, That the granter was extremely drunk, and incapable to consider or consent, when he subscribed it, unless it were alleged that the receiver of the bond did deceitfully procure the granter to be drunk.

Page 38, No. 173.

1682. *February* 10. JAMES HAMILTON, CUT, and EWING, *against* ALEXANDER THOMSON, Saddler.

A CAUTIONER, obliged to sist a debtor to all the diets of process, who compeared at some diets, but not at the pronouncing of decreet, being decerned against, suspended upon this reason, That the design of the caution, *judicio sisti*, was, that there might be *copia personæ debitoris*, to give obedience to the sentence; and the suspender instructed, by an instrument, that, within the days of the charge of the horning, he produced the debtor in court before the bailie, and protested to be free of his cautionary. The Lords suspended the letters *simpliciter*.

Page 56, No. 236.

1682. *March.* CUMMING *against* BAIRD of AUCHMEDDIN.

FOUND, that an *ultimus hæres* might pass, by presentation under the quarter seal, without necessity of a distinct gift or declarator.

Page 7, No. 33.

1682. *March.* The EARL of KINTORE *against* The LAIRD of TOLQUHON.

THE Laird of Tolquhon, being pursued, on the passive title of behaviour as heir, by intromission, Alleged, That he had a warrant from the Lords of Session for what he did. The pursuer answered, That the defender had intromitted with more than was contained in the inventory allowed by the Lords' warrant. The defender replied, That there was an executor confirmed before intenting of the action against him. The pursuer duplied, That, albeit confirmation before citation will purge vitious intromission, it will not purify behaviour as heir by intromission with heirship which is not confirmable; and the heir's election makes what he intromits with to be heirship, though it be not the best thing. The Lords found that passive title relevant among others; for several acts of behaviour were condescended on, as intromission with the charter-chest, and intromission with mails and duties, immediately after the defunct's decease.

Page 7, No. 34.

1682. *March.* SHEWAL *against* RITCHIE and RIDE.

IN the competition betwixt [an assignee] and arrester, whose arrestment was posterior to the intimation of the assignation; in respect the instrument of intimation did not bear that a copy was left at the dwelling-house, or delivered to any servant, &c.

Page 19, No. 101.

1682. *March.* PETRICK RED *against* BAILIE CRAWFURD.

FOUND, that one whose name is used in trust by a third party is not, *hoc ipso*, liable to do diligence, unless by a clause he be obliged thereto.

Page 20, No. 102.

1682. *March.* SINCLAIR *against* SINCLAIR.

A MOTHER having lent money, and taken the bond payable to her second son, with a provision, that, in case she stood in need of the money, she should have power to uplift and dispone on it;—the Lords found she could not discharge the debt for mere love and favour, or dispone on it gratuitously.

Page 39, No. 179.

1682. *March.* DALMAHOY *against* HUGH MAXWELL.

MANY of the Lords inclined to think, that a person in prison, having corroborated a bond and decreet, could not quarrel that decreet upon iniquity: but that point was waved upon another allegeance of transaction by abatement.

Page 39, No. 180.

1682. *March.* CAPTAIN ALISON *against* LORD DUMFRIES; and BALGONY *against* CLERK.

THE Earl of Dumfries, being pursued on his bond of 5000 merks, assigned; proponed compensation on a holograph note due by the cedent, to which the defender acquired right since the cedent's death. Answered, The pursuer had raised a process for payment of the bond before the defender's right to the holograph tone. Replied, The assignation, not being intimated in the cedent's lifetime, the bond assigned remained *in bonis defuncti*, so as the assignee could not pursue thereon till he confirmed the same; and the defender's ground of compensation, though acquired after the commencing of the pursuer's action, must be sustained, since it was before his confirmation of the subject assigned.

The Lords, in respect there was a competition of creditors, found the defunct was not fully denuded, unless the assignation had been intimated before his death; and so sustained the compensation; although, when the creditors do not compete, a cedent is looked upon as fully denuded by an assignation, though not intimated in his lifetime, and the sum assigned would fall under the assignee's escheat, if claimed by the donator, and no creditor of the cedent be competing.

The Lords also inclined to have sustained an adjudication led on such an assignation, in the cause of Balgony against Clerk, this same month, as a formal diligence; seeing the competitor did not derive right from Muir the defender's author, but from Carnegy the common author to Clerk and Muir, whose debt was fully established, although Balgony had not intimated his assignation in Muir's life: but this point was not voted in Clerk's cause.

Page 60, No. 258.

1682. *March.* Sir Daniel Carmichael *against* James Johnston.

A wadsetter, who had right to the reversion of an apprising, having used an order of redemption,—the Lords found, That the appriser should, upon payment, assign his apprising to the wadsetter; seeing the appriser had no other debt resting to him, and so could have no prejudice by assigning; albeit the appriser contended, that he was only obliged to renounce:—but found, That the assignation should bear a provision, that, by the acceptation thereof, the apprising should only have the effect of a security for the sum paid to the appriser, and not expire in prejudice of the debtor, or his other creditors: for it was considered, that, by the acceptation thereof, the apprising should only have the effect of a security for the sum paid to the appriser, and not expire in prejudice of the debtor or his other creditors: for it was considered, that, by the assignation to the reversion, the creditors should not be worse than if the debtor had redeemed; *quo casu* the right of apprising would have been extinguished, and the benefit had accresced to the creditors, though, if it had been a posterior apprising, there would have been no necessity for an assignation.

Page 65, No. 275.

1682. *March.* Mr William Gaiens *against* The Laird of Drum.

The Lords found, That, when a debtor's tailyied estate is to be apprised, it is more formal to charge the heir of tailyie to enter, than to charge the heir of line, who cannot enter, although the heir of line's estate is to be first discussed.

Page 65, No. 276.

1682. *March.* Rankin *against* Lady Stonyhill.

The rents of an apprised estate being arrested by another creditor, after the

appriser was in possession, upon a pretence that the apprising was satisfied, and the tenants having broken *medio tempore*;—the Lords found, That the loss of the rents arrested, through the tenant's insolvency, was not to fall upon the appriser; because the arrester was to blame, that did not insist in his forthcoming, and then the appriser would have compeared and got up the duties, seeing his debt is not yet paid. But many of the Lords thought it was proper for the appriser to have loosed the arrestment, which was but on a dependence; seeing he knew best that his debt was not satisfied. *Page* 65, No. 277.

1682. *March.* PROVOST ANDERSON *against* JAMES BOGIL.

THE defender, in a reduction and improbation, having produced the extract of a bond out of the public register, to satisfy the production; and the principal not being found after searching of the registers;—the Lords, before granting certification, allowed a farther search to be made, seeing the warrants were not in order. But it was the more suspicious that it was registrat in the year 1652, when the principals were got up again.

Page 146, No. 529.

1682. *March.* CAPTAIN ALISON *against* LUDOWICK CANT.

THE signatures of two base infeftments of annual-rent, whereof the one was two months prior to the other, being passed the same day in exchequer, before the first term of payment of annual-rent, the Lords brought them *in pari passu*. But, it being thereafter informed that Alison's charter was expede the great seal a month before Cant's, and that the charter was the complement of the confirmation;—the Lords preferred Alison, unless Cant could purge his negligence, by proving, that the expeding of his charter was delayed by the keeper of the seal, after he had, *debito tempore*, given it in. *Vide* No. 593, [Alison and Aikman against Cant, 13th December 1682.]

Page 163, No. 587.

1682. *March.* CLARK *against* ERSKINE of BALGONY.

FOUND, that though writers not inserted may be designed, yet, if they be dead, their hand-writ ought also to be produced.

Page 253, No. 892.

1682. *March.* WILLIAM HAY *against* ROBERT BURNET.

ROBERT Burnet, who had a general disposition of all his father-in-law James

Cockburn's effects, for relief of cautionary he stood engaged in for James, having, after James's death, received a bargain of victual, that had been bought by the defunct conform to a contract, and transmitted to Leith by the seller, who knew not of the buyer's decease; the seller pursued Robert Burnet for the price. Alleged for the defender, That the disposition to him, for an onerous cause, comprehended this bargain, *emptio venditio* being perfected *solo consensu* without tradition; and the seller had no hypothec for the price. The Lords found Robert Burnet liable, if the victual was delivered after James's decease, seeing it could not be properly *in bonis* [of James] before delivery.

This decision seems somewhat irregular; but it was considered that the pursuer was a minister, and the defender was the defunct's son-in-law, and a writer to the signet, who had only a general disposition, and no particular assignment to the bargain; *Castlehill's Pratt. tit.* Summons, No. 30.

Page 254, No. 899.

1682. *March.* KEITH of LUDQUHARNE *against* MULLIKEN.

FOUND that the seller of victual by sample was not obliged to make it simply good and sufficient, though he was obliged by the contract to that effect; but that it should be good and sufficient as the sample.

Page 254, No. 901.

1682. *March* 6. The CHILDREN of JEAN ANDERSON; and GORDON, Factor; and JAMES RIDDEL; *against* ANDREW BRUCE.

A SUM in an heritable bond being payable to Andrew Bruce's three children, with a provision, in a distinct clause, that, in case they deceased without heirs, the sum should belong to Jean Anderson and her heirs; the Bruce's bairns being all dead, the said Jean Anderson having also died before them,—the Lords found, That the next person in the tailyie behoved, in order to make a title to the bond, to be served heir to the last of the Bruces instituted, and not only cognosced as heir to Jean Anderson. *Vide* No. 959, Gordon against Bruce, March 1682.

Page 39, No. 178.

1682. *March* 8. BOYD *against* LORD DALHOUSY.

AN adjudication on the late Act of Parliament found not to stop personal execution till the adjudger attained possession of the lands.

Page 1, No. 3.

1682. *March* 8. The MARQUIS of QUEENSBERRY *against* STUART.

MY Lord Queensberry having intented reduction and improbation, and obtained certification as superior, against Morton, a little time after Achinbyne had apprised from him; and one Sharp having apprised from Morton after the certification, and the superior having bought in the first apprising;—the second appriser contended, That he ought to be allowed to redeem the first. Alleged for my Lord Queensberry: That the certification in his improbation did as effectually denude the vassal, as if he had resigned *ad remanentiam*, or disponed the legal reversion of the first apprising before the second was led; and so Sharp had no interest to redeem the first apprising, seeing the legal was not carried by his apprising; yea, though the superior had not acquired the first apprising, he, by virtue of his certification, would have been preferred to redeem it, and would have excluded the second appriser. The Lords sustained the allegeance made for Queensberry.

Page 65, No. 274.

1682. *March* 10. JAMES HENDERSON and his SPOUSE *against* Young SAUGHTONHALL and his SPOUSE.

FOUND that a wife had right to a terce, though not reserved in her contract, since she was not thereby, or otherwise, expressly excluded from it. *Vide* No. 666, Craigleith against Prestongrange, 23d November 1681.

Page 190, No. 669.

1682. *November.* ——— *against* My LORD CARDROSS.

A CREDITOR may adjudge any part of his debtor's lands he thinks fit; and the Lords of Session have not power, by the Act of Parliament, to determine localities at their option. And the Lords found the debtor obliged to produce a rental of his whole lands, in case he stopt an adjudication of the whole estate.

Page 1, No. 4.

1682. *November.* The LAIRD of COLLEIN *against* HUGH KENNEDY.

COLLEIN, being resting 1000 merks to Kennedy of ———, he drew a bond for the money, payable to Kennedy and his wife, &c. and intrusted the same to Kilkerran, to be delivered by him to the creditor: afterwards, upon Kilkerran's representing to Collein that Kennedy desired rather to have a blank bond, Collein gave him a bond blank in the creditor's name, forgetting to retire the former: after payment of the last bond, Kilkerran procured from Kennedy an assignation to the first; Kennedy being pursued by Collein for damage and

interest, through his assigning of the first bond after the last was satisfied; and having deponed that the first bond was never presented to him for his own debt, but that he had granted the assignation eighteen months after the date of the bond, upon Kilkerran's saying that he had made use of his and his wife's name to secure the money from his own creditors, which he did *bona fide*, thinking that he was but denuding himself of a trust;—the Lords assoilyied Kennedy, though there were many obvious presumptions that Kilkerran had not acted fairly in the matter; particularly, he was a subscribing witness in the first bond, which made it look like something else than a trust for his behoof.

Page 37, No. 165.

1682. *November.* HENRY BLYTH *against* THOMAS LAWSON.

FOUND that if any part of the sum, duly apprised for, be not satisfied within the legal, that the whole lands apprised belong to the appriser. *Vide* No. 281, [Blyth against Lawson, December 1682.]

Page 66, No. 279.

1682. *November.* HELEN COASH *against* JOHN KING.

SEISIN, granted *propriis manibus* to a singular successor in burghland, without an adminicle in writ, not sustained; though seisin in these, granted to heirs by hasp and staple, has privilege.

Page 164, No. 592.

1682. *November* 2. LADY KIRKLAND *against* THOMAS BURKLAE.

FOUND that the expenses of funerals, mournings, entertainment of the family to the first term after the defunct's death, the relict's lying in, and baptism of a posthume child, are all privileged debts; for defraying whereof the relict had retention of the executry goods, *pro tanto:* albeit the defunct was *maxime obæratus* and the relict had a considerable jointure; and the creditors contended, that, in respect of the husband's condition and burdens, nothing ought to have been privileged but funeral expenses; at least that the other debts, if allowed to be due, should have no preference.

Page 122, No. 445.

1682. *December.* BONHARD *against* BORREL, in NEWBURGH.

ONE having granted a bond for salt to an overseer of coal and salt, designed

overseer;—the Lords, in a competition between [the] overseer's creditors and the master of the salt-pans, preferred the master, and presumed the salt came out of the master's pans, unless the contrary were proven.

Page 39, No. 181.

1682. *December.* The LAIRD of AIRTH *against* the LAIRDS of QUARREL.

THE Laird of Quarrel elder, being debtor to my Lord Elphingston, in the sum of 2000 merks, not bearing annual-rent, and my Lord Elphingston being debtor to my Lord Torphichen in the like sum bearing annual-rent,—young Quarrel was assigned thereto, and pursued my Lord Elphingston; who craved compensation, in respect young Quarrel being *in familia*, it is presumed he acquired the debt pursued for by his father's means; and that the course of annual-rent ought to sist from the date of his right. The Lords,—in respect old Quarrel was cautioner with Bonhard for the like sum to my Lord Torphichen, and the bond contained an obligement to infeft in old Quarrel's land;—found, that Torphichen's bond was acquired by the father's means; and so sustained the compensation, although the son was only bound in the clause of relief to Bonhard and the father.

Page 60, No. 254.

1682. *December.* CHRISTY *against* CHRISTY.

MR James Christy having left Jean Christy, his daughter and only child, executor and universal legator, and David Christy, failing her by decease; Jean did execute the testament, and obtain sentences for the defunct's moveables, and died shortly after she had been confirmed executrix and had executed the testament by obtaining sentences for the defunct's moveables; and Mr James's relict brought forth a posthume about nine months after his father's decease, called James, who was served executor to Jean his sister, and pursued by David Christy as substitute to her in the office of executry and universal legacy, to make payment of all Mr James's goods and gear. Alleged for the defender, That, as the father had preferred the defender's sister to David the substitute, it is presumed that he would *multo magis* have preferred the defender his son; for, by the civil law, *ex supernascentia liberorum testamentum rumpitur*, and, *in substitutione fidei commissaria*, the children of the party institute were always preferred to the last substitute, a stranger, or in a remoter degree, and donations were revokable *agnatione liberorum*. Answered for David Christy, This is a great novelty in our law, where the effects and solemnities of testaments are quite different from what they are by the civil law, in consideration of *hæredes sui*, and other subtilties, which have no foundation in our custom; and, seeing the father hath not declared his mind as to the supposeable and possible case of a posthume, *casus omissus habetur pro omisso*. 2. As an infeftment of tailyie to Jean the daughter, and, failing of her, to David, could not have been quarrelled by the posthume brother, though it carried away some part of the heritage, far

less can the substitution to the universal legacy be impugned, which only affects the dead's part, the sister's legitime being transmitted to the defender her brother, as her nearest of kin. Here parties are not in the case of the civil law, and the *fide* commissary institutions; for the sister institute had no children; and the *magna pars bonorum* was disponed; and *transmissio jure sanguinis* is only competent to descendants. The Lords, having considered this debate, demurred to determine the cause; but resolved they would hear parties upon this point, if the testament, being confirmed by the sister and decreets taken against the debtors payable to her, did establish the right of the sums in her person, so as they did no longer remain *in bonis defuncti*, although they were neither paid to her, nor innovated by her? Alleged for the brother, That with us the legitime transmits even before confirmation, which is but *modus acquirendi;* and though, by the ancient civil law, *hæreditas inaudita non transmittitur*, yet the *jus novum* allowed the exceptions of *jus suitatis*, to which our legitime answers, *jus sanguinis, et jus deliberandi;* and the nearest of kin having right with us *jure sanguinis*, it ought to transmit *jure sanguinis* without confirmation, as was decided, *anno* 1663, in the case of Bell and Wilkie. Answered for David Christy, That, by the current of our practice, the interest of nearest of kin doth not transmit without confirmation; and executors recovering decreets doth execute testament, so as the office cannot transmit; yet the right of the sums are not established in the person of the executor or legator, unless they be received, or the securities innovated. The parties settled before interlocutor. *Vide* No. 222, [Cameron, February 1688;] and No. 454, [Henderson against Saughtonhall, March 1683.]

Page 122, No. 446.

1682. *December.* ANDERSON and OSWALD *against* MORTIMER.

FOUND that a child alive at the dissolution of the marriage, though it die before confirmation, makes a tripartite division. 2. That, seeing bonds bearing annual-rent are heritable *quoad relictum*, and only moveable in favour of bairns, they always come under a bipartite division. 3. That a wife's provision to goods and gear did not comprehend *nomina debitorum* bearing annual-rent.

Page 123, No. 449.

1682. *December.* PRINGLE *against* FULLERTON of CRAIGHALL.

ONE imprisoned in France, at a creditor's instance, having granted a bond to another person for another cause, and raised reduction thereof *ex capite metus;* —it was alleged for the creditor in the bond, That the imprisonment being lawful, it was not *justus metus*, though the bond had been to him that did imprison the granter; *multo minus* can it be obtruded to a third party that had no accession to the imprisonment; and all the pursuer could crave, was, that the bond might not cut him off from any defences against the debt. Answered for the pursuer, That he being under no obligation before the granting of the con-

cussed bond, that ought not to be made use of to constitute the debt against him. The Lords found the reason of reduction, as libelled, not relevant; and that a party lawfully imprisoned might grant a bond gratuitously, where there was no antecedent cause.

Page 147, No. 331.

1682. *December* 6. GAVIN HAMILTON *against* the HEIRS of BONNAR.

JEAN Lockhart having commenced a process for 4000 merks, as the half of the tocher provided to return to her, in case of no children, by her contract of marriage with John Bonnar;—it was alleged for the defender, That the tocher could not return, because it was never paid. Answered, The wife must have the benefit of the provision, unless it were alleged that the husband had done sufficient and timeous diligence for payment of the tocher, and could not recover the same. Which answer the Lords found relevant. But the defender condescending afterwards, upon diligence, *viz.* that he had pursued Captain Lockhart, the debtor, when insolvent, who was the pursuer's uncle, before the Chancery of England, where the process depended three years;—the Lords sustained the diligence, and assoilyied, although the process was never brought to any determination: And had it been sooner intented, might have proved more effectual; but Captain Lockhart's condition altering unexpectedly, by the eviction, from him, of a considerable land-estate, and the process having been intented, within two years after the term of payment of the last moiety, against so near a relation, the Lords sustained the diligence as competent.

Page 84, No. 347.

1682. *December* 13. ALISON and AIKMAN *against* LUDOWICK CANT.

IN a competition between two base infeftments of annual-rent, confirmed in Exchequer in one day, but the one expede a month before the other at the great seal, they were not brought *in pari passu;* but that which first passed the seal was preferred, unless it were made appear that the other was as timeously offered to the keeper of the seal. *Vide* No. 587, [Alison against Cant, March, 1682.]

Page 164, No. 593, [1st.]

1682. *December* 20. LORD ROSS *against* KER of MORISTOWN, &c.

MR John Wilkie, having granted an assignation, to his creditors, of some debts due to him by Sir John Wilkie of Fouldown, which was intimated to the Lady Ross, his daughter and heir; and, thereafter, Mr John having restricted the said sums to the half, in favours of the Lord Ross;—alleged for the Lord Ross, That his lady being minor and married, intimation ought to have been made to

him, as husband, seeing he now competes upon a right, as creditor. Answered, Although, in cases where wives or minors are prejudged, and are *in damno vitando*, it may seem reasonable to acquaint the husband or curator, yet the want of that intimation to husbands or curators cannot be obtruded to third parties. And in this case the husband, who could not but come to the knowledge of the said intimation, as he would have been *in mala fide* to have paid the cedent; so himself being now debtor with his Lady *jure mariti*, was *in mala fide* to take any positive right or privative, by a discharge or restriction; and is not so favourable as another person, who innocently might have taken a second assignation, after the first was intimated. The Lords inclined to sustain the answer; but the point was not put to the vote, in respect the creditors insisted in their reduction upon the Act of Parliament 1621.

Page 20, No. 104.

1683. *January.* ALSTON *against* ROSS.

FOUND, that, notwithstanding of the Act of Parliament, strangers may be arrested within burghs for their debt; but that a Scotsman born could not be arrested upon a bond granted by him, after he had resided year and day in Scotland; and that he was free, notwithstanding of caution given *judicio sisti*.

Page 14, No. 78.

1683. *January.* ARCHIBALD AINSLEY *against* DALMAHOY and HANNAY.

A PRINCIPAL and cautioner having granted a bond for money borrowed from Thomas Weir, in name of, and as pertaining to one Wallace, his brother-in-law, payable to Wallace or Weir;—the Lords found, That Thomas Weir, as *correus credendi*, might have uplifted the money from the debtor, and effectually discharged him thereof; yet he could not, without a factory from Wallace, assign the bond to the cautioner, upon payment made to himself. This was found *pro* and *contra*; but, at length, the factory was produced.

Page 20, No. 105.

1683. *January.* SIR JAMES TURNER *against* MR JAMES PILLANS.

A SECOND appriser claiming to come *in pari passu* with the first effectual appriser; it was alleged for the first, That the second appriser had intromitted several years with the whole rents, and could not share with him in time coming, till he had once intromitted with as much effeiring to his sum as the second appriser had gotten. Answered for the second appriser, That apprisers are only to share equally when they concur; and the first appriser has himself to blame that he neglected formerly to put in a share; and as, if the second appriser had been completely satisfied and paid by his intromissions, the first appriser would

have had no repetition of any part, seeing these intromissions would have extinguished the second apprising; no more can he hinder the second to continue in his possession, by uplifting mails and duties *pro rata*. The Lords sustained the first appriser's allegeance; and found that he might likewise intromit with the rents for refunding the whole expenses of his apprising.

Page 66, No. 282.

1683. *January.* EDWARD WRIGHT *against* the EARL of ANNANDALE.

FOUND that a comprising, led for a principal sum, and some bygone annual-rents thereof, which had been paid, was not simply null, (though it could not expire; and the accumulation of annual-rents or necessary expenses fell;) but did subsist as a real security for the principal and current annual-rents. And Found, That though grounds of compensation, existing before leading of the apprising, and not applied, did lessen so much of the sums therein contained, yet the apprising did subsist for the remainder, both *quoad* accumulations and expiring. *Vide* No. 290, [Baillie of Torwoodhead against Florence Gairner and his Son, March 1683;] and No. 292, [John Græme against the Creditors of Innergelly, March 1683.]

Page 66, No. 283.

1683. *January.* ALEXANDER SINCLAIR *against* WILLIAM DUNDAS.

FOUND that seven years' possession did not afford the benefit of a possessory judgment to a second appriser against the first, whom he was within year and day of; but here the second appriser did not offer to renounce the benefit of coming *in pari passu*.

Page 67, No. 285.

1683. *January.* COUTS *against* STRAITON.

SOME of several persons of the name of Couts, nearest of kin in the same degree to one Clement Rouchhead, having granted an assignation of their share of a bond falling under executry to Arthur Straiton, and the rest having, after the cedent's decease, confirmed the whole;—it was alleged by them against Arthur Straiton, That he could have no right by the assignation, the cedents having died before their interest of nearest of kin was established in their persons by confirmation; so that it could not transmit, but remained *in bonis defuncti*. Answered, By the civil law, *dies legati cedit a tempore mortis testatoris*, and the testament was but *modus acquirendi*. The Lords found the pursuers, who were executors, had right to the whole; and that Arthur Straiton had no share by the assignation.

Page 123, No. 448.

1683. *January.* ANDREW AIKMAN *against* LEWIS CANT, &c.

FOUND that infeftment, and possession upon a bond anterior to the granter's rebellion, attained *in cursu rebellionis*, either voluntarily or by diligence, before expiring of the year and day, was preferable to the liferent-escheat, as being a prior public right.

Page 164, No. 593, [2d.]

1683. *January.* MAXWEL of NETHERYETT *against* STUART of SHAMBELLIE.

STUART of Shambellie having suspended, upon compensation, a decreet for £300, obtained against him by Maxwel of Netheryett, and having, after an interlocutor sustaining the compensation, but before the pronouncing of sentence, beat the charger; he, the charger, insisted upon the Act ——, Parl. 14, James VI, and craved the letters might be found orderly proceeded. Alleged for the suspender, That it was only the meaning of the said Act that the invader should not be allowed to propone any thing after the invasion; but it were hard to cut him off from compensation already sustained. Answered, The charger did industriously give the first provocation by injurious words, knowing the suspender to be a hasty man. Replied, The suspender must be cut off from his reasons of suspension; for the Act of Parliament operates as much as a discharge of the debts suspended on, so as they can never be the gronnd of any action in time coming, or sustained as a defence or reason of suspension in this process, and has not simply the effect of an absolviture *ab instantia*, but extinguishes the litigious subject. The Lords having found, upon advising the proof, That though the charger uttered first some injurious words, the suspender gave the first blow with his staff, and so was the first aggressor: They found the pursuer's reply relevant, and that the suspender was cut off from his grounds of compensation founded on, and could not use them in any other process. *Vide* No. 934, [Strachan against Tolquhoun, January 1687.]

Page 254, No. 902.

1683. *January* 6. MR RIVEN and his CREDITORS *against* PATRICK KER.

IN a competition betwixt Edward Ruthven's Creditors and Patrick Ker, who had adjudged a right of annual-rent out of my Lord Callender's estate, belonging to Riven the common-debtor;—it was alleged for the rest of the creditors, That Patrick Ker could not have the fifth part more than his principal sum and annual-rents; because, 1. The subject of his adjudication being only an annual-rent, which, upon requisition will produce ready money; and so the reason in the Act of Parliament for allowing an additional fifth part, *viz.* that the creditor is forced to take land for his money, doth not hold. 2. The debtor offers payment of the sum adjudged for, within the legal of five years, which must cut off the claim of fifth part more; as redemption within the legal would

extinguish an adjudication or apprising of the whole lands. Answered, 1. *Non refert* whether the subject adjudged be land or annual-rent; for, if the debtor, upon requisition, should refuse to pay, the creditor is as little master of the money as if lands were adjudged, and the fifth part more is granted to creditors, not simply because they take lands for money, but also by way of penalty for the delay of their payment: for, as Stair observes, £100 is the usual penalty for 1000 merks of principal, which, with 50 merks of sheriff-fee, (that is the 20th part,) extends to 200 merks, the fifth part of 1000. 2. *Esto* special adjudications be redeemable within five, the fifth part is due as in lieu of penalty and sheriff-fee: as apprisings, redeemed within the legal, carry penalties and sheriff-fees, otherwise the adjudger would get no allowance of the expense of his adjudication, or of penalties: for the Act of Parliament, in the clause of redemption, orders only the payment, or consignation of the principal sum and annual-rent the time of the adjudication, the composition to the superior, and charges of infeftment. The Lords repelled these two allegeances, in respect of the answers; and found the fifth part also due.

Page 1, No. 5.

Nota. By the Act of Parliament, creditors, at redemption of partial adjudications, get nothing for expenses in lieu of the fifth part.

Page 2, No. 6.

1683. *January* 6. THE EARL of DUNFERMLING *against* The EARL of CALLENDAR.

IN the minute of contract of marriage, betwixt the Earl of Callendar and the Lady Dunfermling, *in anno* 1633, he having obliged himself to provide the conquest, debts being first paid, to her in conjunct-fee and liferent; it being alleged, That the said provision did extend only to lands and sums to be conquest, and not to teinds,—for that clauses of conquest are *strictissimi juris*, and land and teinds are *jura separata*;—Answered, The minute being drawn by my Lord himself, who was no lawyer, it appears, that, under the designation of lands, he understood teinds; for, having provided her to the conjunct-fee of the lands and barony of Livingston, without mention of teinds in the obligement, in the clause mentioning the rights and securities granted to her, it bears of the said lands, together with the teinds; which implies, that he looked upon lands to comprehend teinds in the first part of the obligement. 2. The conquest is provided to her in the same way as she is provided to the lands of Livingston, and consequently to the teinds of the conquest. 3. The Lady's opulent jointure of 20,000 merks being the only subject out of which there was any prospect of conquest, it were unreasonable to disappoint her thereof. 4. She being provided to sums, she had right thereto, whatever way employed, whether on lands, teinds, or bonds *jure surrogati*. The Lords, in respect of the conception of the minute above mentioned, found the Lady to have right to teinds. Here, it was not considered, if the teinds were under tack, or annexed to the lands. The Lords also found, That the price of lands sold by the Earl of Callendar, before the marriage, was not to be presumed remaining at the

time of the marriage, unless it were proven: *quo casu* it would be presumed that they were employed to acquire lands after the marriage; and a proportion of lands effeiring thereto would not be considered as conquest during the marriage: And, albeit the pursuer could prove that these sums were otherwise expended, yet it is not without debate, but that lands effeiring thereto ought to be subduced from the conquest; seeing, had not these sums been so employed, others with which the conquest was made might have been expended upon the occasion; and, money being a fungible, we are to consider the species on't, whether it be the individual money that belonged to the husband before the marriage, or not; but it is equally reasonable that the estate, before the marriage, be made up, which perhaps may be liable to the like obligement of conquest of the first marriage, as that debt due by the husband before the second marriage should be paid out of the conquest during the marriage, where there is no preceding estate; and if there be an estate, it is reasonable the debt be deduced out of it. *Vide* No. 352, [Laird of Niddery against his Brother James, February 1683;] and No. 391, [Frazer against Frazer, 6th December 1687.]

Page 85, No. 349.

1683. *February.* GRANT of KIRDELLS *against* BIRKENBURN.

GRANT of Kirdells, [mentioned *supra*, No. 131, Grant of Kirdells against Birkenburn, 8th December 1682,] having insisted that the defender should count for 7000 merks, as the price of lands contained in the disposition, and the value of the lands being proven not to exceed 6000 merks;—the Lords found that the defender, as a conjunct person, needed to hold count for that sum only; and, *quoad ultra*, was in the case of a stranger, the disposition bearing the receipt of the whole 7000 merks.

Page 27, No. 133, [1st.]

1683. *February.* BONNAR *against* WILLIAM ARNOT.

A FATHER having assigned a bond to his wife in liferent, and to their daughter, and the heirs of her body in fee; which failing, the one half of the fee to the wife, and the other half to his own brother:—by a distinct clause, in case the daughter died without bairns, the father, *per verba de presenti*, disponed the money to his wife and to his brother, by equal portions. The daughter having chosen a curator, left the sum to him in legacy at her death; which was questioned by her uncle, because she could not disappoint, by her testament, the conditional assignation in the last clause, which existed. Answered, The testator, being fiar by the conception of the assignation, she might dispose of the sum, although, by the last clause, the mother and uncle might have succeeded thereto, *ab intestato*, without a service. Replied, The testator could only have spent it, or disposed on't for onerous causes; and 'tis usual for parents, in bonds of provision to their children, to adject a quality, that the money should return, in case of their decease before such an age, or unmarried; which bonds the Lords have often found, particularly in the case of the children of Laureston, could not be assigned without an onerous cause. The Lords sustained the legacy left by the daughter, February 1683. But the contrary was afterwards determined

in this cause, *viz.* That the daughter could not legate sums in prejudice of her mother and uncle, who were substitute to her. *Vide* No. 354, [Bonnar against Arnot, February 1683; Dict. p. 12,976.] *Page* 41, No. 185.

1683. *February.* OGILVY *against* JAMES HUME; and FAIRY *against* CRAIGDARROCH and LAG.

IN a pursuit at the instance of the representatives of an apothecary, for payment of a bond for apprentice fee, granted to the defunct by his apprentice,—it was alleged, That the apprentice having been bound for five years, his master died after he had served but three years, a proportion of the fee ought to be retained, as *causa data non secuta.* Answered for the pursuers, That, after three years, in which time the apprentice had sufficiently learned the trade, the want of his future service was only prejudicial to the master. The Lords allowed retention of a proportion, which was modified.—*February* 1683, *Ogilvy against James Hume.*

And in another case, where a master broke, while some years of the apprenticeship were to run, the Lords allowed a proportional abatement.—*James Fairy against Craigdarroch and Lag.* *Page* 41, No. 186.

1683. *February.* ROBERT HEPBURN *against* SIR JAMES TURNER.

POSTERIOR apprisers of ward-lands, within year and day of the first effectual appriser, (who had taxed the ward, and paid a great composition to the superior,) craving to come *in pari passu* with him after the expiring of his apprising; —it was alleged for the first effectual appriser, That the other co-apprisers behoved not only to pay a share of the expenses of his apprising, but likewise a share of the composition for taxing the ward-lands; seeing the king's charter of apprising contained a clause, that, after expiring of the legal, a new infeftment should be expede; and the said first appriser, having a separate estate, which might be affected by the marriage-casualty, if the ward should fall, was obliged to get it taxed, which is profitable to the pursuer. Answered for the posterior apprisers, They are content to take their hazard of the casualties of ward and marriage, and, not being in the like circumstances of danger, cannot be obliged to pay any share of the taxing: therefore, the first effectual apprising being expired, the lands must divide, and the obtainer must expede his own infeftment. The Lords found the posterior apprisers not obliged to bear a proportion of the composition paid for the taxing, but declared, that if, at any time, they should make use of the benefit of the taxing, they should be liable in a share of the composition. *Page* 67, No. 288.

1683. *February.* GEORGE TELFER *against* WILLIAM PATON.

A DONATOR of escheat having pursued a special declarator against the rebel's

relict,—it was alleged for the defender, 1. It being two years since her husband's decease, possession of moveables is a presumptive title. 2. She had confirmed the goods as executor-creditor, upon her contract of marriage, before the gift; which legal diligence, for an antecedent debt before the horning, must have the same effect against the donator as arresting and poinding; and, the goods being in her own possession, she could not pursue herself. The Lords found the second allegeance relevant; but found, that the rebellion cut off the right of thirds, seeing truly the defunct had no goods; and the right of the third is but a consequential interest, in case the husband have goods; although diligence for positive obligements are allowed, for commerce sake, to prejudge donators.

Page 114, No. 428.

1683. *February.* HUME *against* ARNOT.

ONE Arnot, an appriser of lands for a small sum, being year and day at the horn, and his liferent-escheat gifted;—it was alleged for the rebel's creditors, who had adjudged the right of that apprising posterior to the liferent-escheat, That, as to the rents of the apprised lands lying in the tenant's hands, the rebel could only have so much of the mails and duties as answered to the annual-rents of the sum comprised for, in regard the superplus rents ought to be deduced off the stock, which falls not under liferent-escheat; although, if the rebel had uplifted the whole rents from the tenants, these, as being moveable, would have fallen in the single escheat. The Lords found the allegeance relevant, and that the rebel's creditors had right to the superplus.

Page 114, No. 429.

1683. *February.* RUSSEL and TAIT *against* GEORGE CLARK.

ONE being pursued for delivery of some merchant-goods bought by the pursuer,—Alleged for the defender, That he, the same day the goods were sold, sent and told the pursuer, that, upon perusal of his books, he had been mistaken as to the price of the goods, and could not sell them so cheap, and so there ought to be *locus penitentiæ* to him, who instantly resiled before the intervention of writ or delivery of the goods. Answered, *Emptio venditio solo consensu perficitur*, without writ; nor was agreed to, that writ should intervene in this bargain. The Lords repelled the allegeance, in respect of the answer.

Page 255, No. 903.

1682, *December*; *and* 1683, *March.* ALEXANDER TROUP *against* DAVID CRAIGHEAD.

MARGARET and Helen Wishearts, as heirs-portioners served to John Craig-

head, their cousin-german by the mother's side, having disponed to Alexander Troup, some tenements of land in Aberdeen; who pursued reduction of David Craighead's service of heir to the said John Craighead, his uncle by the father; David Craighead pursued likewise a reduction, against Troup, of his author's service: in which mutual reductions both parties pretended to the right of nearest of kin to the defunct. It was Alleged against the first retour, That the witnesses adduced for the contingency of blood were neither sworn nor subscribing, though they could write. Answered, *Esto* the depositions do not bear the witnesses to have been sworn, yet they were, *de facto*, sworn; and, though they had not been sworn, the inquest might have proceeded on their proper knowledge, being both judges and witnesses. The Lords ordained the parties to be heard upon the objections against the propinquity of blood *hinc inde*.—*December* 1682.

It was afterwards alleged for the first service, That the inquest having found the party served nearest agnate to the defunct, the same cannot be quarrelled, seeing that would infer perjury in the witnesses, and that the assizers were *temere jurantes*. Answered, That the witnesses adduced in the last service were more pregnant than these in the first; and the depositions in either service are to be considered as depositions made before answer. The Lords, before answer, ordained a probation to be led by commission to the commissary of Aberdeen, which of the two parties served was nearest agnate so the defunct; and afterwards, upon advising the depositions in the report, found the party last served to be the next agnate; and reduced the first service.—*March* 1683.

Page 148, No. 533.

1683. *February and March.* JOHN CARSTAIRS *against* ELPHINGSTOUN of QUARREL.

IN the improbation of a discharge, as to the date in October 1652, for verifying an allegeance of minority the time of the granting thereof, one of the witnesses being dead, and the other having deponed that it was his subscription; but that he thought he subscribed it in the year 1651, the harvest after Worcester fight; and that he was not witness to any other discharge between the pursuers and defender at any other time; and, at advising, two other discharges, wherein the deponent was a subscribing witness, being produced;—the Lords perceiving no vitiation in the date, by ocular inspection, and considering the witnesses are not able to remember so ancient dates of writs, and that the deponent was not positive that it was in the 1651, but only he thought so, they assoilyied from the improbation.—*February* 1683.

Thereafter the pursuer craved to be allowed to prove he was *alibi* all October 1652. Answered for the defender, That new articles cannot be received after advising the improbation. Replied, After the direct manner of improbation is closed, by examining of the instrumentary witnesses, the pursuer may recur to the indirect articles. The Lords sustained the reply, and allowed the pursuer to condescend, and consign, which had not been done at first.—*March* 1683.

Page 149, No. 538.

1683. *March.* Sir George Lockhart *against* Stuart of Arvorloch.

In a multiplepoinding betwixt an annual-renter and a personal creditor, who had arrested the common debtor's rents for terms after the other's infeftment, and recovered a decreet of forthcoming before it was made public;—the Lords preferred the annual-renter, seeing a base infeftment affords a sufficient right to mails and duties in a competition with personal rights.

Page 164, No. 594.

1683. *March.* Andrew Cant *against* Westerton.

By a contract of marriage, the tocher being payable to the husband, his heirs and executors, and he obliged to add the like sum, and to employ the same on land or annual-rent to himself, and his wife in liferent, and to the bairns of the marriage in fee; the heir claimed the said tocher, as belonging to him by virtue of the said destination, and in the case of the Act of Parliament about securities, containing an obligement to infeft. Alleged for the debtor, That the sum fell under executry, and, as such an obligement is reputed moveable *passivè*, and prestable by the debtor's executors; so, *e contra*, it ought to be performed to these *activè*; nor is it in the case of the Act of Parliament, where the creditor intends to make his money heritable, by taking from his debtor an obligement to infeft; for here is an obligement by the father, who was creditor himself; and the heir cannot quarrel the not-performance on't. The Lords inclined to sustain the defender's allegeance, as being exclusive of the pursuer's title; but, before answer, ordained the executors to be cited. Alleged for the executors, That the sum, by the quality of the obligement to heirs and executors, is moveable. Answered, *Esto* the father had received the money, yet the obligement of destination, in favours of the heir, is prestable to him by the executors, and does not evanish by the father's death. Replied, The word heirs is not to be strictly understood to exclude bairns from coming in *pro rata*, though this be the contract of a first marriage; since, then, the younger children would not have any provision.

Page 8, No. 35.

1683. *March.* Duff of Drummuire *against* Innes of Coxtoun.

A summons of transferring *passivè* against an apparent heir, being raised within year and day after the defunct's death; the pursuer having craved that the depositions of some witnesses might be taken to lie *in retentis*, for proving some points of the principal libel;—Alleged for the defender, That no act or step in an old process can proceed *intra annum dèliberandi*, more than a new process could be intented: besides, there would be this inconvenieney in such a method, that the apparent heir durst not move any interrogatories to the witnesses, for fear of a passive title; and the reserving his interrogatories and objections

would signify nothing, if the witness died in the mean time, during the interval of the defender's deliberation. Answered for the pursuer, Any action that hinders not the apparent heir to deliberate, and contains no personal conclusion against him, such as declarators, transferrings, &c. may be pursued *intra annum deliberandi*. The Lords refused to examine the witnesses; nor would they, at the pursuer's desire, grant presently a commission for examining the witnesses, who were very old men, at a day after expiring of the year of deliberation, which would run out before another session.

Page 9, No. 40.

1683. *March.* ROBERT RICHARDSON *against* SIR WILLIAM SHARP.

A GRATUITY of 3000 merks, given by the king to a soldier for apprehending a rebel, found not arrestable by his creditors, especially before it was paid to him by the cash-keeper, as having the privilege of *stipendium militare*.

Page 14, No. 79.

1683. *March.* ALEXANDER ABERCROMBIE *against* DAVID SEATON.

AN assignee to a bond, who was obliged to use all manner of legal diligence against the debtor, before he recurred against the cedent; having proceeded the length of caption against the debtor;—the Lords found, That he had done sufficient diligence, and needed not to take a gift of escheat, nor poind goods, nor adjudge lands; and therefore sustained process against the cedent: albeit it was alleged that the obligement to diligence, being general, imported both real and personal diligence.

Page 21, No. 106.

1683. *March.* BAILLIE of TORWOODHEAD *against* PATRICK GARNER.

FOUND, that a person having taken an assignation to mails and duties in corroboration of a debt, and entered into possession by uplifting a part, was not obliged to continue to intromit as apprisers are. But here it was not alleged that he had excluded any other creditor from intromitting.

Page 21, No. 107.

1683. *March.* SEATON and HARVEY *against* LUMSDEN.

FOUND, that the assignation of sums heritable, by a clause secluding executors, is not *in bonis defuncti*, or confirmable, though not intimated in the ce-

dent's lifetime; but here the defunct's executors were competing, and not another creditor upon his diligence.

Page 21, No. 108.

1683. *February & March.* BONNAR'S CREDITORS *against* WISHART his RELICT.

IN a competition betwixt an heir and executors, for the sums in a bond bearing an obligement to infeft, and secluding executors, on which the creditor had given a charge of horning, and died before payment;—Alleged for the heir, Though a bond that is heritable by an obligement to infeft, may be rendered moveable by a charge, yet the calling for payment of a bond, where executors are excluded expressly, doth not import any design in the creditor to alter the destination in favours of executors, but only imports a design to have the money better secured for the heir's behoof; and the clause secluding executors in a bond that was heritable *ex sua natura*, did argue *enixam voluntatem* to cut off the pretensions of executors: And, though the charge would make the sum fall under escheat, it could not make it belong to executors; for several things belong to heirs that fall under escheat, such as heirship moveables, tacks for years, &c. Answered for the executors, The design of taking bonds secluding executors, is mainly to secure against the commissaries, that a title might be made to them without the charges of quote and confirmation; and, if a charge of horning did not make such bonds moveable, creditors would be difficulted how to secure their money from the burden of confirmation, and at the same time to preserve it easily as a fund for younger children's provision, seeing parents are generally averse from granting assignations to such bonds in their own lifetime: so that the clause secluding executors is not to be considered as the parent's resolution to prefer the heir, but only as the quality of an heritable right; and the case of Chrystie against Chrystie, 13th July 1676, was but a single practique, and contained a specialty too. The Lords found, by the plurality of one vote, That the charge of horning did make the sum moveable, and to belong to executors. —*February* 1683.

Thereafter it was alleged, That, after the charge of horning, the creditor had apprised, which took off the effect of the charge. Answered, That, after the apprising, the creditor denounced the debtor upon the charge, and took out letters of caption, and arrested him in prison: and also arrested sums of money belonging to him; upon which, action of forthcoming was commenced, and carried on some length: all which being done before the creditor's decease, were strong indications of his inclination to have up his money, and more than equivalent to a charge of horning. Replied, Custom having fixed upon the formality of a charge, no equivalent acts are to be sustained; and, suppose a person had charged for an heritable sum, and thereafter comprised for it, the charger's proceeding to denunciation and caption would not have made it moveable; nor would a decreet upon the arrestment have made the ground thereof moveable, without a charge upon the decreet, more than a decreet of registration, without a charge, would have had that effect. The Lords repelled the answer, in respect of the reply; and found the diligence

therein condescended on did not make the sum moveable after the apprising; and so was not equivalent to a charge.—*March* 1683.

Page 41, No. 187.

1683. *March.* JAMES HENDERSON *against* SAUGHTONHALL.

FOUND, that, of bonds taken to a man and his wife, and the longest liver, the husband is fiar-substitute, though the wife survive; and that the sum, though moveable, needs no confirmation.

Page 42, No. 188.

1683. *March.* DAVID SCRIMZOUR *against* MARGARET HAY and her ASSIGNEE.

ONE having paid £100 sterling of £200, upon the creditor's obligement to warrant him as to that £100; was not found obliged to pay the other £100 to an assignee, till he got surety that he should be harmless as to the first £100; but was allowed retention upon that head, though the debtor was not yet troubled for it, the cedent being insolvent.

Page 61, No. 257.

1683. *March.* BAILIE JUSTICE *against* NISBET and AIKENHEAD.

IN a competition between an appriser and one having right by a disposition of a date anterior to the denunciation, where the obtainer of the disposition had expede a base infeftment thereon, after the decreet of apprising, but before the appriser had charged the superior; which base right was confirmed by the superior after the appriser's charge;—it was alleged for the receiver of the disposition, That he, having the first complete real right, ought to be preferred to the appriser, whose apprising and charge against the superior was but a diligence; for, though a charge be equivalent to infeftment, in a competition of diligences of the same nature, *viz.* apprisings and adjudications, it hath not that effect where a comprising competes with a voluntary right. 2. As the disobeyed charge did not infer contempt or *mora* in the superior, unless the appriser had offered a charter and a year's duty, nor would hinder him from nonentry, ward, marriage, &c. upon the death of the debtor, far less could a stranger-purchaser, who is completing his diligence, be prejudged by the charger, who is only obliged to notice what diligence is real and upon record. 3. Though it may be pretended that the legal diligence is favourable, a buyer's case is more favourable; for it were harder to disappoint a purchaser, who pays a real price that may be affected by the seller's creditors, than to frustrate the diligence of a compriser, who is at no greater loss thereby than he had before. Answered for the appriser, A charge against the superior is esteemed equivalent to infeftment, as to all effects except removing; and it was not in the power of the superior,

after he was charged, to prefer a voluntary right. The Lords preferred the disposition having infeftment and confirmation, in respect the disposition was prior to the appriser's denunciation; and so there could be no suspicion of fraud in the receiving thereof.

Page 68, No. 289.

1683. *March.* Mr Hugh Dalrymple *against* Lord Crichton.

One having, without an onerous cause, restricted his apprising to a less sum, in case the same was punctually paid at such a day; the debtor failing in payment, the appriser, after the day, claimed the whole sum in his apprising. Alleged for the debtor, That he offered to purge the failyie by payment of the restricted sum; and the like was allowed in the case of the Lady Gray against Earl of Mareschal. The Lords allowed the party to purge, though it was a conventional irritancy: but here, the parties being relations, the point was not much controverted.

Page 69, No. 291.

1683. *March.* John Græme *against* The Creditors of Innergelly.

Found that the first infeftment upon an apprising, or the first exact diligence for obtaining the same, makes, by Act of Parliament, the first effectual apprising; and that a posterior infeftment, upon a prior apprising, cannot be drawn back in prejudice thereof; but that a bare charge against the superior is not the exact diligence the act requires, unless a charter and composition be also offered to him. In this cause an apprising was found simply null upon this ground, That a part of the sums apprised for, had been paid to the appriser himself. *Vide* No. 283, [Wright against Earl of Annandale, January 1683;] and No. 290, [Baillie of Torwoodhead against Gairner and his Son, March 1683.]

Page 69, No. 292.

1683. *March.* Lamberton *against* Hilton Johnstoun.

Pled, but not decided, that a creditor comprising the debtor or his cautioner's lands, equivalent to the value of his debt, could not, after expiring of the said apprising, apprise again, for the same debt, any other lands belonging to them, although he might have done so within the legal; seeing the creditor's selling the lands apprised within the legal, to others, would have imported satisfaction of his debt; so his retaining the same, till the legal expired, must have the like effect, since an apprising is a judicial sale. Here, the creditor had disponed the expired apprising to one of the cautioners, whose lands were denounced after expiring of the legal, and who, having satisfied the creditor, was recurring against the co-cautioners for relief. *Page* 69, No. 293.

1683. *March.* BAILIE GARSHORE *against* WEIR of DALRYMILLS's RELICT.

THE Lords reduced a wife's provision, that was somewhat exorbitant, in her contract of marriage, *post contractum debitum*, to an annuity suitable to the husband's free estate.

Page 91, No. 358.

1683. *March.* The MARQUIS of MONTROSE, DONATOR of BUCHANNAN's ESCHEAT, *against* His RELICT.

IN a contract of marriage, the general clause of parks was restricted to such parks as were not set for rent, but only used for pasturing the husband's own goods.

Page 92, No. 359.

1683. *March.* THOMAS CARGILL *against* JOHN TULLOCH and EARL of MARSHALL.

FOUND that a clause in the procuratory of resignation of a vassal's charter, That, how oft this escheat fell, it should be gifted to him gratis,—or a general clause therein relative to the provisions in a contract, whereof this was one,—is real against singular successors in the superiority. The like found, the same month; *vide* No. 431, [Earl of Marshall and John Tulloch against Thomas Cargill, March 1683.]

Page 114, No. 430.

1683. *March.* MR MATTHEW M'KELL *against* SANDILANDS and OTHERS.

IN a process for payment of a bond, at the instance of an assignee whose assignation was granted, without an onerous cause, by the cedent on his deathbed, and intimated before his decease;—it was alleged for the debtor, (with whom the cedent's nearest of kin and the commissaries concurred,) That the gratuitous assignation granted on deathbed, though it bears no *cogitatio mortis*, or *instans periculum*, must be reputed *donatio mortis causa*, and be confirmed; for, if such assignations on deathbed were sustained, without confirming, the bishop would be prejudged of the quot, and creditors would want the benefit of caution, in case the assignation were reducible upon the Act of Parliament 1621; whereas, if they be confirmed, the assignee confirmed executor would find caution, and other creditors would be allowed to compete with him. 2. If gratuitous deathbed assignations were allowed, dying persons would dispose of all their estate by assignations. 3. It was found, in the case of Rickart against Rickart, that money delivered in specie, *in lecto*, must be confirmed; and, for the same reason, sums assigned on deathbed are liable to confirmation. Ans-

wered for the pursuer, This assignation being *per actum inter vivos*, and not in a testamentary way, nor bearing *mortis causa*, needs no confirmation; and what is done in sickness, not making mention of death in general, or in special, are deeds *morientis*, not *mortis causa*, and are not to be regulated as testamentary-deeds, or donations *mortis causa*, which are null if the party or creditor predecease before the granter, and liable to revocation: for the time of sickness is *æque habile* as *liege poustie*, to grant deeds not prejudicial to relicts or children; and it were a great charge to the lieges to confirm particular assignations, and rights made *in lecto*, wherein dole is not presumed, as in dispositions *omnium bonorum*. The Lords found there was no necessity of confirmation in the case. And here the defunct had no relict or children, who must be prejudged.

Page 124, No. 452.

1683. *March.* BAILIE GARSHORE, &c. *against* BRAND, Relict of Weir.

NOT only do commissaries prefer wives for their provisions to the office of executors; but even in a competition between a relict and other creditors, where the children were nominate and confirmed executors in a testament testamentary, the Lords would not bring in the parties *pro rata*, but preferred the relict *primo loco*, seeing the debt exceeded the estate. But the parties did afterwards settle, and the point was not fully considered. *Vide* No. 478, [Keith against Keith, 17th February 1688, Dict. 11,833.]

Page 124, No. 455.

1683. *March.* SMITH *against* SIR DAVID CARNEGY.

IN a reduction of a horning, at the instance of one Smith, upon these reasons; 1. The party was charged to pay an illiquid sum, *viz.* the remainder of his rent, over and above what paid the annual-rent condescended on in the charge, which was due upon infeftment: and so the charge was in the case of general letters. 2. The execution of the denunciation did not bear copies to have been left at the cross. Answered, 1. The annual-rents due upon infeftment being condescended on in the charge, and known to the rebel by his use of payment, the superplus was sufficiently special, and the rebel ought to have suspended *debito tempore*, though the charge had been unjust or informal; and, not having suspended, his escheat falls, *propter contemptum*. 2. Though copies of executions of inhibitions and interdictions are left at the cross, for acquainting the lieges with the thing, it is not usual to leave copies of denunciations of horning. The Lords reduced the horning upon the first reason, and gave no answer to the second. *Vide* No. 520, [Douglass of Earnslaw against Sir Patrick Hume, 20th July 1688.]

Page 143, No. 514.

1683. *January and March.* JAMES SIMSON *against* the ARCHBISHOP of ST ANDREW'S.

MARGARET Burnet's creditor having adjudged from her, as lawfully charged to enter heir to William Burnet, and raised reduction of John Burnet's right, who was infeft by my Lord Traquair, upon a precept of *clare constat*, as heir to the said William, upon this reason, that his sasine was *falsum in data*, in so far as it bore date 3d December 1674, and the precept of *clare* was dated the 29th of the said month; the Archbishop of St Andrew's commenced a declarator to hear it found, that the precept was of a date prior to the sasine, and that the posterior date it bore had been filled up by mistake. Alleged for the defender, That to sustain such a declarator would be of a dangerous preparative, especially in a competition of creditors; and that *falsum in data quam præ se fert, est falsum in toto:* and it is more probable that the date of the sasine is false than the date of the precept mistaken, seeing there is a note of the date and witnesses thereof indorsed upon the back of the precept, which probably has been taken at the subscribing, before filling up of the date. The Lords, before answer, ordained Traquair, the subscriber of the precept and the writer and witnesses insert, to be examined anent the precise date of the precept, as near as they can remember. —*January* 1683.

Probation being led, it appeared that the precept was delivered blank, and was in the hands of my Lady's writer, and the composition paid to him some months before the date of the sasine. It was alleged for the Archbishop, That the precept being anterior to the sasine, and the true date of the sasine astructed by the depositions of the witnesses thereto, and the sasine narrating the precept, 'tis evident that the error hath not been in the sasine, but in the filling up the date of the precept, which, at the worst, is but error or *falsum ex errore*, and not competent to be debated in a competition of John Burnet's creditors; so that the precept being granted in John's lifetime, and before the sasine, (whatever be the particular date of it,) will hinder Margaret's service as heir to their father William, which was unjust and fraudulent, and designed to cut off all the brother's creditors. Answered for the pursuer of the reduction, That *falsum in data falsum in toto;* and the witnesses must condescend on a precise date of the precept; nor is it enough to say, that it was of an indefinite date preceding the sasine, seeing the means of improbation would be cut off thereby; and the user of a blank precept, quarrelled as false, would be obliged to condescend on the date of it. The Lords delayed to advise the point.—*March* 1683.

Page 147, No. 532.

1683. *March.* JOHN LAW *against* DAVID HUME.

IN the reduction of a decreet of reduction in absence, the Lords found, That the now producing of the paper, then called for, did not fully satisfy the production; but that the pursuer must likewise produce the decreet of reduction, and extract it himself, it being *in publica custodia;* yet found that the first reducer

should have no expenses of his decreet, if he put the present pursuer to take out a new extract for satisfying the production.

Page 150, No. 539.

1683. *March.* BAILIE SINCLAIR *against* JOHN WILLIAMSON.

ONE cocquet found sufficient for the whole loading of a ship, and that merchants needed not take particular cocquets for their parcels.

Page 194, No. 685.

1683. *March.* JOLLY *against* PATERSON.

IT being alleged against an instrument of consignation, That the order was null: For that, 1. The instrument did not bear that a procuratory was produced or shown;—*Laird of Bass against Wachops, 13th November* 1622: Nor, 2. That the money was *numerata*, but only, that there was a bag of money produced, which, by ocular inspection, contained the 2300 merks: 3. It was null for not bearing the expenses were consigned. Answered, There was no occasion to produce a procuratory, the creditor being absent; and, *de facto*, there was a procuratory, which is now produced. 2. It was in vain to tell the money in the church when the party was absent: but, immediately thereafter, it was numerate, and consigned in the hands of the dean of guild of Edinburgh, as appears by the instrument. And 3. The sum to be consigned being only 2000 merks, the odd 300 merks was consigned in lieu of expenses; and, if the expense be more, the superplus is offered at the bar. The Lords sustained the order.

Page 242, No. 848.

1683. *March.* STRAITON of LITHRISK *against* THOMAS M'GILL.

THE witnesses adduced in a criminal process, for mutilation, before the justices, having, after compearance and answering to their names, been seduced to go away, whereby the dittay being remitted to an assize, the pannel was acquitted for want of probation;—the party mutilated raised a process, before the Session, for damage and interest, against the enticer of the witnesses to withdraw. Alleged for the defender, That such a process was a novelty, seeing *non constat* that the witnesses would have deponed that the mutilation was committed by the pannel. The Lords sustained process for damage, without putting the pursuer to prove what the witnesses would have deponed.

Page 255, No. 904.

1683. *March.* Sir John Foulis of Revilstane *against* Sir Patrick Nisbet of Dean.

A muir, by decreet-arbitral, being decerned to belong, both as to property and commonty, to two in common; one of the parties raised a process *de commune dividendo*, seeing *communio parit discordias;* and craved the encouragement of the Act of Parliament anent inclosing, in respect he designed to inclose his part. Answered, This were a contravention of the decreet-arbitral decerning the lands to be possessed in common; and, *in re communi, potior est conditio negantis.* The Lords, before answer, appointed a visitation of the ground, if it lay proper for inclosing, in respect that was controverted.

Page 255, No. 906.

1683. *November.* Gibson *against* Gordon.

An apparent heir found liable as behaving, for entering to possess lands, in the possession whereof his predecessor died,—albeit these lands were apprised, and the legal expired before the predecessor's death,—unless he had a right or tolerance from the appriser.

Page 10, No. 42.

1683. *November.* Porterfield of Douchal *against* Auchinbreck.

This passive title was sustained against an apparent heir, that he continued his predecessor's possession of some lands, wherein he died infeft; and found probable by the apparent heir's oath; albeit it was alleged, that he could not depone concerning the defunct's infeftment, that required solemnities he might be ignorant of. But the Lords declared, that, if the apparent heir denied the allegeance upon oath, the pursuer could not use any other probation of that passive title.

Page 10, No. 43.

1683. *November.* Alexander Chaplain, Writer to the Signet, *against*

An arrester, whose arrestment bore to have been executed at 12 o'clock in the day, preferred to an assignee whose right was intimated the same day, without expressing the hour when it was done, in respect the intimation was not only presumed to have been made the last hour of the day, but also it was owned to have been made in the afternoon.

Page 14, No. 80.

1683. *November.* ALEXANDER MEW *against* MR PATRICK CRAW.

FOUND, that the ten years allowed to creditors for redeeming the rights of apprising acquired by apparent heirs, run not from the date of the rights, where they are latent or in trust, but from the time the apparent heir made them public by infeftment, or some judicial process; for, otherwise, the Act of Parliament might be easily eluded: and here the apparent heir had been several years in possession after his predecessor's death, which might have given some suspicion to the creditor; and it was ten years since the date of the latent right; but the same was never owned till the elapsing of ten years. *Vide* No. 340, [Young Posso against his Brothers, 31st January 1682.]

Page 69, No. 294.

1683. *November.* MR JOHN DEMPSTER *against* MR HARY MORISON.

A DEBTOR having gratified one creditor, after another had done diligence, it was alleged for the creditor preferred, that the sum paid had been acquired by the common debtor after the other creditor's diligence. Answered, That a debtor cannot gratify one creditor in prejudice of another's diligence, by paying money acquired after the diligence, more than by payment of sums in his person before, as an inhibition affects lands afterwards acquired in the same shire where it was executed. The Lords repelled the allegeance, in respect of the answer. *Vide* No. 142, [Nicolson against Provost Kinloch, February 1686.]

Page 70, No. 296.

1683. *December.* MR JAMES MIRK *against* MARY BRUCE.

IN the redemption of an adjudication, the debtor alleged he could not be liable to pay the expenses, in respect the sums adjudged for stood arrested the time of the adjudication, and he could not have paid till the arrestment was loosed. Answered, The debtor has himself to blame, for suffering the creditor to expede his adjudication, without compearing to allege upon the arrestment; for, if the debtor had compeared, and objected the arrestment, or intimated the same, it would have been loosed by the creditor, there being no ground for it; and, therefore, the debtor ought to refund his expenses. The Lords were of opinion that the adjudger should have his expenses refunded; but the parties agreed among themselves before interlocutor.

Page 2, No. 7.

1683. *December.* JAMES WOOD *against* MR PATRICK REID.

ANDREW Balfour, who was bankrupt, having, without any onerous cause, as-

signed a bond to Mr Patrick Reid; after intimation of which assignation, the debtor acquired right to an old debt, due by Balfour the cedent, long before the assignation; and the bankrupt's assignee having pursued the debtor for payment, he, the debtor, raised reduction of the pursuer's assignation, upon the Act of Parliament 1621, as being acquired *titulo lucrativo*, after contracting of the debt he was assigned to. Answered, The pursuer has acquired right to a bond due by the said Balfour, which is a sufficient onerous cause of the assignation made to him. Replied, The defender's assignation being prior to the pursuer's acquiring right to that bond due by the bankrupt, his cedent, and so a ground of compensation, That *inest de jure*, the pursuer's posterior right to his cedent's bond cannot make an onerous cause to support the former assignation in his favours, and cut off the defender's anterior ground of compensation. The Lords assoilyied the defender from the process for payment, and likewise decerned in the reduction against Mr Patrick Reid.

Page 21, No. 109.

1683. *Dec.* Sir William Lockhart of Carstairs *against* Sir William Thomson, and Sir William Thomson *against* David Weems.

In a pursuit, at the instance of Sir William Lockhart against Sir William Thomson, upon a precept granted by him to the pursuer, acknowledging the receipt of 360 merks, and obliging himself to deliver a precept for the same, from the Earl of Crawfurd, lord treasurer, to the pursuer, whose father was one of the public receivers, or else to refund the money;—Alleged for the defender, The delivery of the precept, now that the lord treasurer is dead and exauctorate, is *factum imprestabile;* in lieu whereof, nothing but damage and interest can be claimed; and the pursuer could qualify no damage he sustains through the want of the precept, in regard the Exchequer is debtor *aliunde* to him in a greater balance than he has any hopes to get payment of: so that, in effect, *nihil deest* by the want of the precept. The Lords repelled the defence, and decerned. The contrary found in another case for Sir William Thomson against David Weems.

Page 43, No. 191.

1683. *December.* John Whan, Smith in Leslie, *against* ——————.

In the reduction of two bonds, upon this reason, That they were granted by the pursuer when he was very sick, and in danger of death, and so must be reputed *donatio mortis causa*, consequently reducible and revokable upon his convalescence and recovery;—Answered, *Non relevat* that the pursuer was sick; for sick men may borrow money, and, by the civil law, *donatio facta a moriente* was not *donatio mortis causa*, but considered as a deed *inter vivos:* but then, again, the bonds bear borrowed money, without any mention of death or sickness; which is inconsistent with *donatio mortis causa*. The Lords assoilyied from the reduction.

Page 43, No. 192.

1683. *December.* M'BRAIRE of NETHERWOOD *against* THOMAS ROME.

IN a declarator of extinction of an apprising, it was alleged, That the same could not be effectual as to accumulations and full penalties, but only for the principal sum, annual-rent, and necessary expenses, in respect the appriser's right to the bond, which was the ground of the apprising, flowed allenarly from the creditor's heir, although some annual-rents due before his decease are apprised for, which fell under executry; which ought to cut off accumulations, even as to other sums to which he had right from the heir. Answered, Where any ground of doubt doth appear from the right comprised for, as, if the bond were conditional, or payable at a term after a third person's decease; in that case, if the appriser did not previously declare the condition purified, or if he apprised while the said party was actually living,—there might be some reason to cut off accumulations: but here the bond apprised for being heritable, the appriser had good reason to believe that his right from the heir was sufficient, and was not obliged to inquire when the defunct died; and, though the apprising do not subsist for these annual-rents that fall under the executry, to which the appriser had not a good title, yet, seeing he had a putative title to these, and no dole can be presumed, the apprising *quoad* other sums, to which his title was unquestionable, cannot be restricted to cut off accumulations, or penalties effeiring thereto, seeing *utile per inutile non vitiatur.* This point was not determined, in respect it was alleged, That the appriser had also right from the executor; which the Lords ordained to be produced: but it was found in this cause, that,—albeit where executors pursue, or are pursued, the debtor or executor must have a decreet for their warrant, whereof the obtainer will get no expenses,—yet, if the debtor do not pay after the decreet, but suffer the creditor to adjudge for his money, then there will be no restriction as to accumulations or penalties, but the whole penalties will be due. *Vide* No. 271, [Lord Harcus and Milnes against Lord Pitsligo, February 1682;] No. 303, [Lord Pitsligo against the Lord Hercarse and Provost Miln, February 1684 and March 1685;] and No. 333, [Colvill against William Hally, January 1688.]

Page 70, No. 297.

1683. *December.* THOME *against* THOME.

A PERSON to whom another, in *liege poustie,* disponed all his goods, and assigned his bonds and tickets, having taken an instrument of possession of the goods, without intimating the assignation, and the goods having remained in the disponer's possession till his death; these, with the bonds and tickets, were confirmed by one as executor-dative to the disponer and cedent, who pursued for delivery of the bonds. Alleged for the assignee, That the pursuer, who is an executor-dative, and not an executor-creditor, is bound to warrant the assignation, though not intimated; and there was no necessity of confirmation. The Lords found, that, though the disponer remained in possession, the executor-dative, who represents him in moveables, could not object against the instrument of possession, so that there was no place for confirming the goods; but the assig-

nation, *quoad nomina debitorum*, not being intimated in the defunct's lifetime, the sums therein were *in bonis defuncti*, and confirmable for the security of the debtor's making payment; but that the executor was liable for them to the assignee. And many were of opinion, that the assignee would be preferred to other creditors doing diligence against the executor, unless they had affected the subject by some preferable diligence. But the creditors were not there competing.

Page 125, No. 458.

1683. *December.* LORIMER *against* LUMISDEAN.

AN act being quarrelled as null: for that, 1. The libel was not proven; 2. A defence of compensation was proponed, which had received no answer;—Answered, The defender not having denied the libel, it was understood as acknowledged; 2. Where the Lords give answer to one defence, it is presumed the rest are repelled. Again, the defender did so far homologate the said Act, that he compeared before the commissioner appointed by the Lords, in pursuance, to examine witnesses, and gave in interrogatories; and the cause is advised now four years ago since the Act, without any reclaiming till of late. The Lords would not reduce or ratify the Act, in respect of the circumstances and state of the cause; but they delayed extracting till February, that the defender might pursue for that debt upon which the compensation was founded.

Page 256, No. 909.

1683. *December* 12. ——— *against* ———.

THE obtainer of a decreet of suspension having extracted the bond of caution, and charged the cautioner, who suspended and proponed improbation against the bond, and craved the pursuer to abide by it;—it was alleged for the charger, That the bond of cautionary not being to him, but given in to the clerk of the bills, he could only abide by the extract he had gotten out of the clerk's office. The Lords, having considered that bonds of cautionary are sometimes forged, and that the suspender behoved to be called, they decerned against the cautioner: superseding extract till the latter end of January; that, in the mean time, the cautioner might raise a summons of improbation, and insist therein, which they would summarily take in in this process, and would ordain the clerk of the bills to satisfy the production, by giving in the principal bond.

Page 150, No. 542.

About 1683. REID *against* BARNER'S HEIR.

IN a pursuit, at the instance of Jean Reid, against the heir of one Barner her husband, for a jointure provided to her by her said husband, in contemplation

of 2000 merks of portion contracted by her;—it was alleged for the defender, That the pursuer *habuit intus*, seeing the portion was not paid and she had no discharge thereof. Answered, Wives do not always take discharges of their tocher, as third parties do, when they are obliged for them; and the husband ought to have left a discharge: And the marriage having subsisted for the space of seven or eight years, the tocher ought to be presumed satisfied, as the Lords found in the case of David Dick's wife against ——— her first husband's heir. The Lords sustained the answer, and the defender having thereafter referred the verity of this allegeance to the relict's oath, the Lords, in respect she was now clothed with a second husband, ordained her to depone, only to affect herself in case she survived the husband.

Page 86, No. 350.

1684. *January.* ROBERT HANDISIDE *against* WILLIAMSON.

IN a competition betwixt an arrester and the possessor of a prior precept, drawn by the common debtor, and accepted by the person in whose hands the money was arrested;—it was alleged for the arrester, That the precept, as gratuitously given after the arrester's debt, was quarrellable upon the Act of Parliament 1621; and the onerous cause being referred to the possessor's oath, he deponed that himself was not creditor to the drawer, but his brother was. The arrester objected against his oath, that the quality is extrinsic; and it must be otherwise proven that the brother was creditor to the drawer; and, *esto* that were proven, the arrester's diligence should be preferred, unless it were made appear, *scripto*, before the arrestment, or by the arrester's oath, that the precept was given for the brother's debt. It were again a dangerous preparative to allow persons, whose rights are quarrelled as wanting an onerous cause, to impute them to the payment of a creditor who had done no diligence, and so to disappoint the diligence of another creditor. The Lords, before answer, ordained the debtor, drawer of the precept, and the possessor's brother, to be examined if the precept was truly granted at the time for the behoof of the brother; who had sold some goods to the drawer for ready money; and, as was alleged, had verbally ordered his brother to receive his money or the precept.

Page 15, No. 81, [1st.]

1684. *January.* MARY BRUCE *against* SIR PATRICK HEPBURN.

MARY Bruce, relict of John M'Pherson, having, after his decease, adjudged certain sums of money belonging to him, for satisfaction of bygone and future annuities during her lifetime, of £10,000, which the defunct was obliged, in his contract of marriage, to employ upon land or annual-rent, to him or her, the longest liver; and had not performed it;—this adjudication was quarrelled by Patrick Hepburn, another adjudger, within year and day, upon this ground, That she had not liquidated the terms to come to a certain sum at the rate of so many years; which is a nullity; because, 1. A creditor can no more adjudge or apprise for future annuities, than he can poind them; 2. There is

no total sum qualified, upon which the adjudication is redeemable; 3. Such an adjudication could not expire in ten years. Answered for the adjudger, The foresaid arguments take only place where the ground of an adjudication is *obligatio dandi* by payment, and not where it is *obligatio ad factum præstandum*, as this is; and here the obligement, in the contract, to settle a sum in favours of the wife, betwixt and such a day, became prestable *in totum* after elapsing of the day, although the particular payments fall to be due at the several terms of her life, and these could not be valued estimate to a liquid sum, it being uncertain how long she would live; and it were unreasonable that other creditors should carry away all, in the case of her surviving the years of the modification. It were also a defect in law, to find no diligence equal to the performance of a debtor's obligement; and in this case the adjudication of the property of the sum, or of an annual-rent effeiring to £10,000 out of it, is but in effect a real security, and always redeemable upon securing the adjudger by infeftment, conform to the obligement in her contract of marriage. Again, an adjudication of lands upon an obligement to dispone the same, is not redeemable by payment of money, seeing the lands in special are *in obligatione*, which could not be fulfilled *per equipollens;* and, as there may be arrestment *declaratorie*, before the term of payment in moveables, so there may be an adjudication; which is not execution, but only a diligence. The Lords found the answer relevant, and sustained the adjudication as formal.

Thereafter it was contended for the relict, That the other posterior diligences, though within year and day, could not come *in pari passu* with her adjudication, whereof the ground is an obligement to infeft, and not to pay: and not liquid to a particular sum before the leading of it; and, consequently, falls not under the Act of Parliament, which seems only to respect diligences for liquid sums, which may be proportioned in a competition;—*December* 12, 1677, *the Lady Frazer against the Creditors of the Lord Frazer and the Lady Marr*. Answered, The reason of the Act of Parliament militates equally in all cases; and the interest of this adjudger may receive an estimation in a competition with other diligences. The cited practique seems not to be well founded: besides, there is this difference between the two cases, that the obligement, to the Lady Frazer, was to infeft her in particular lands in lieu of others renounced by her, which stated her in the case of one having a special disposition; whereas the obligement here is but to employ a sum in general. The Lords allowed the other diligences within the year, to come *in pari passu*.

Page 92, No. 360.

1684. *January*. JEAN CALLENDER *against* My LORD SALINE'S DAUGHTERS.

A MAN having a bond of 3000 merks, to himself and his wife, in liferent, &c. whom he was formerly obliged, by contract of marriage, to provide to the liferent of 5000 merks; she, after his decease, pursuing for the annual-rent of the bond, the debtor pleaded compensation upon sums belonging to him which the pursuer's husband intromitted with. Answered, The compensation can only affect the fee, and not the liferent, which is secured to the pursuer by the provision in the bond. Replied, It is usual for men to provide the liferent of sums

to their wives, and yet, being master of the bonds, to give them back, and uplift the money without the wife's consent; and, consequently, they might discharge or extinguish the same by compensation. Duplied, When such a thing is intended, the bond uses to bear a faculty to the husband to uplift without the wife's consent, and this bond must be presumed to have been so conceived, in implement of the contract of marriage, although it do not expressly relate thereto. The Lords found the answer and duply for the relict relevant, though no infeftment on the bond had passed in her person; and that the grounds of compensation, prior to the bond, could not be obtruded against the wife, seeing the obligement to pay annual-rent to her was a passing from all these grounds.

Page 93, No. 361.

1684. *January.* JEAN YOUNG *against* WILLIAM YUIL.

THE like to the former decision, [the preceding case,] was found two days after, betwixt Jean Young and William Yuil, with this difference, that the bond related to the obligement in the contract, whereby the tocher was to be so employed.—*Vide 29th March* 1626.

Page 93, No. 362.

1684. *January.* LEARMONTH *against* THOMAS WILSON and His WIFE.

MR Thomas Learmonth having complained to the Lords, by bill, in his own name, That a decreet against his deceased client, the Laird of Ratho, a tutor for whom he had compeared, was surreptitiously extracted in terms different from the minutes; and thereupon, the Lords having ordained the decreet to be re-produced, Mr Thomas insisted upon his new defences, which occasioned new interlocutors: but the pursuer perceiving that the apparent heir, who bruiked the defunct's estate by an expired apprising, lay by, and did not crave any amendments to shun a passive title, he alleged there could be no ratification of the decreet, unless there was a lawful contradictor; and that Mr Thomas's *mandatum*, as advocate, expired with the death of the tutor: and though the defunct's other creditors should concur, as they do not, yet they could only crave that the decreet should be conform to the minutes that were passed before the defunct's decease; but an advocate who had no interest could crave no rectification. The Lords adhered to the new rectifications craved by the advocate, they being materially just, though there was no other contradictor. This was irregular.—*Castlehill's Pratt.* tit. *Decreets*, No. 33.

Page 108, No. 403.

1684. *January.* AGNES BAIRD *against* ROBERT STUART.

Found that a decreet-arbitral, whereof the matter in difference was depending in a process, was not reducible upon lesion *ultra dimidium*, more than if there had been a transaction; seeing, the matter being uncertain and litigious, the lesion could not be known.

Page 109, No. 404.

1684. *January.* ROBERT PATERSON *against* Mr GEORGE JOLLY.

A DECREET of the English judges, *in foro*, being suspended upon iniquity, for their repelling this defence, That the summons which should have been executed upon twenty-one days, were executed upon fifteen days;—Alleged for the charger, That the decreet not being reviewed within year and day, it could not be quarrelled but upon such grounds as a decreet of the Lords is quarrellable; and their decreet is not quarrellable upon iniquity. Answered, Though decreets of the English judges could only be quarrelled within year and day for want of authority, they are quarrellable after year and day as other decreets, by the ordinary remedy of suspension and reduction, upon relevant grounds: And, whatever might be said as to doubtful grounds of iniquity, yet, to repel a defence warranted by an express Act of Parliament, *viz.* that summons should be executed in twenty-one days, cannot be justified: for that is *judicare de legibus*, and not *secundum leges*. The Lords differed much in opinion, if this ground of iniquity was to be sustained against the judges' decreet: but,—it having appeared from inspection of the decreet, that the defence was repelled upon this relevant reply, That the libel was proven, *scripto*, by instructions given out therewith *ab initio*,—the point debated was waved, and the decreet sustained.

Page 266, No. 946.

1684. *January.* GOSFOORD *against* LORD BARGENY.

FOUND that one pursuing a trustee, to denude himself of the trust, was obliged to refund to the defender the expenses he was at in establishing and enabling himself to transmit the right, and also to relieve him of non-entries, ward, &c. to which he might be liable by reason of the trust, albeit the pursuer was a singular successor to the granter of the trust.

Page 268, No. 951.

1683, *March; and* 1684, *February.* RAPLOCH *against* BAILIE HALL.

RAPLOCH, being incarcerated for £1200, raised suspension upon this reason, That the bond, being signed blank for borrowed money, for the behoof of his son Samuel, and delivered to him, thereafter the suspender got Monkland to advance the money; and Samuel pretending he had not the bond in town, gave a discharge on't before the charger, Bailie Hall, had intimated his right to the blank-bond;—Answered for the charger, That his name being filled up, *non constat* if it was delivered to him in blank, it being usual for debtors to take bonds in their creditors' name, and Samuel was debtor to the charger in £800; 2. Samuel could never have been designed to be creditor; for he and the writer are the only two witnesses. The Lords ordained Bailie Hall and James Edmiston the writer, to be examined if the bond was blank *ab initio*, and if it was not delivered to the Bailie by Samuel. And they deponed, that it was signed

blank, but do not remember if it was delivered by Samuel, or the writer, to the Bailie. And Raploch having condescended on the onerous cause of the discharge, for that it was granted by a conjunct person, and offered to prove the same, the Lords resolved to examine Samuel; and he, being abroad in Holland, ordered the bill to pass, and Raploch to be set at liberty, upon granting a disposition conform to the act of sederunt, although the act declares that persons imprisoned are not to be set at liberty upon juratory caution; but Samuel's absence was the special motive.—*March* 1683.

Thereafter the suspension being discussed, and the oaths of Bailie Hall and the writer advised, who deponed that the bond was drawn and signed for the use of Bailie Hall, to whom Samuel owed a considerable sum of money, and that the bond was delivered to Edmiston or Samuel, to be delivered to Bailie Hall;—the Lords found, That although, when parties received blank-bonds at the second hand, from another creditor that took it blank, the second creditor ought to intimate it as an assignation to secure against the deeds of the first creditor, yet that a bond delivered blank to the first creditor needs no intimation; and therefore found the letters orderly proceeded.—*February* 1684.

Nota. This seems to frustrate diligences against blank-bonds; for the receiver of the blank-bond, to save the necessity of intimation by a second creditor, may allege that it was designed, *ab initio*, for that creditor or any other he pleases; and so it passes through many hands, and is secure upon that pretence; so, at least, it should be declared before the witnesses of the bond, to whose behoof it is taken, *ab initio*, otherwise the receiver of the bond to be reputed the first creditor.—*Castlehill's Pratt.* tit. *Bonds*, No. 145.

Page 40, No. 184.

1684. *February.* POURIE *against* The LADY Ross and her CHILDREN.

A MINOR having granted to his tutor a general discharge, with consent of his curator, who likewise took burden for his pupil,—the Lords found, That, if the minor should quarrel the discharge, as not proceeding upon a full charge, the tutor might recur against the curator; and that the curator, as in the case of a cautioner, had not the benefit of the personal exceptions of minority, &c.

Page 57, No. 240.

1684. *February.* SIR ALEXANDER HUME *against* WILSON.

IN a removing, at the instance of an adjudger, against the debtor's heir, the defender desired a locality might be assigned to the pursuer at the sight of the Lords, conform to the Act concerning debtor and creditor; 2. He alleged the adjudication was null, for that it adjudged for principal, annual-rent, and penalty, and a fifth part more; and consequently for more than was due. Answered, 1. The clause in the Act Debtor and Creditor, concerning localities, was temporary—and relative only to these comprisings whereof the legal was prorogate,

after expiring, for three or six years at most; for, had it been designed to extend to all apprisings, it would have mentioned apprisings in general, and not *the said apprisings;* which clears it to be only a branch of the former paragraph. The benefit again of assigning localities was in favours of the debtor, that he might force the creditor to possess; whereas here the creditor is desirous to possess. Nor can the privilege take place, except where all the creditors that have done real diligence, especially such as come *in pari passu*, have localities assigned them: now, the defender could not assign any localities in his land, but what might be disturbed by other creditors who have transcendant anterior voluntary rights; 2. The adjudging for the fifth part more was no nullity; because the summons being libelled in order to a special adjudication, conform to Act of Parliament, when the creditor could not know but the debtor would have produced a progress, the conclusion could not be altered upon the not-production of the progress, although that made it have the effect of an adjudication of the whole estate; but then the fifth part more was adjected as a superfluous clause, and the adjudger claims no benefit thereby. Replied, 1. That debtors might not starve during the legal comprising, which is a severe diligence, the Parliament thought fit to astrict creditors to localities, that might pay their annual-rents in the mean time, and to give them the lands after expiring of the legal, which was but a moderate *laxamentum:* the reason doth equally hold in favours of all apprisings; and the benefit ought to be perpetual and not temporary only, seeing, again, it is provided by the clause, That possession apprehended by apprisers, is to be ratified as restricted; that demonstrates how it respects the case of a creditor willing to possess, as well as the case of one that is unwilling, and lies off; 2. The creditor having adjudged expressly for the failyies, he ought not to have adjudged for the fifth part, which is in lieu of the failyie and sheriff-fees; for they, by Act of Parliament, fall under the fifth part, and are not accumulate with the principal sum and annual-rents. The Lords found, That the clause restricting apprisers to localities was not temporary, but a perpetual law; and that, in respect the style of decreets of adjudication had not been uniform, the fifth part more should not prejudge this adjudication, but be restricted to the penalty, if that be not adjudged for expressly, and should operate nothing, if it be; and ordained an Act of Sederunt to be extended, declaring, That decreets of adjudication, where the debtor doth not produce a progress, should run for the principal, annual-rent, and penalties only, and not for a fifth part more; and that all such adjudications for an additional fifth part hereafter should be quarrellable by the debtors.

Page 72, No. 302.

1684. *Feb.* JOHN MUIR, Writer to the Signet, *against* SHAW and CHALMERS.

AN apprising being quarrelled as null, in so far as annual-rents paid were apprised for;—Alleged for the defender, That he being assignee to the bond, the ground of the apprising, and to the bygone annual-rents resting owing, and ignorant *facti alieni*, he had reason to presume all annual-rents were resting; so that his apprising for some that were paid could be no nullity, but only infer a restriction. Answered, Though such a mistake in an assignee to an apprising,

in so far as it is to his own behoof, might be excused, yet it must operate a nullity, in so far as the apprising is to the behoof of the cedent, who assigned to annual-rents generally, without restricting precisely to what were due; as such an apprising, led in the cedent's own name, would have been simply null. The Lords found the apprising, in so far as it was to the behoof of the cedent, simply null, and not to subsist as a real security: but, before pronouncing interlocutor, it was recommended to settle the parties. *Vide* No. 283, [Mr Edward Wright against Earl of Annandale, January 1683;] No. 290, [Baillie of Torwoodhead against Florence Gairner and his Son, March 1683;] No. 311, [Margaret Crawfurd against Oliphant of Condy, March 1685;] and No. 312, [Lady Hisleside against Matthew Baillie, February 1685.]

Page 73, No. 304.

1684. *February.* WILLIAM GORDON *against* ROBERT LEARMONTH.

ONE Downie, infeft upon an apprising of the lands of Balcomy, having disponed his right to Gordon of Lesmore, who was also infeft, and transferred the same to Mr William Hieson, who pursued exhibition of the apprising, and grounds and warrants thereof, against Balcome's apparent heir;—Alleged for the defender, That the apprising being in the hands of the debtor, or his apparent heir, it was *instrumentum apud debitorem*, &c. Answered, Though the brocard holds in personal rights, transmissible by assignation, which may be destroyed upon re-delivery, real rights are not extinguishable but by renunciations or conveyances. The Lords found the answer relevant.

Page 112, No. 419.

1684. *February.* WILLIAM AULD *against* JOHN SMITH.

ONE having delivered a principal bond to his son-in-law unregistrate, who gave it up to the debtor, and got a new bond in his own name in lieu thereof; the creditors of the father-in-law pursued the debtor; and having referred the debt to his oath, he deponed, and acknowledged the matter of fact above-mentioned. Alleged for the pursuers, That the haver of a principal bond, wherein another person was creditor, could pretend no right thereto without an assignation; and the debtor who got it up from another than the creditor, had reason to suspect, that it was either found or fraudulently abstracted. Answered for the debtor and son-in-law, That they offered to prove, by witnesses, that the father-in-law declared to them he had given the bond to the defender, in order to be renewed in his son-in-law's name. The Lords, before answer, ordained the witnesses to be examined, and the debtor to be re-examined upon that point. *Vide* No. 467, [Reach against Polwart, November 1685.]

Page 125, No. 457.

---

swered for the arrester, That he having arrested before the assignation, and been in ordinary diligence, the common debtor could not disappoint his arrestment, which was *nexus realis*, by any voluntary assignation. Replied for the assignee, The arrestment is null, in so far as the copy bears That the arrestment was used at the within designed Sir William Primrose's instance, for a debt due to the within designed Sir Charles Erskine; so that the designation is not full, and the execution is but a loose paper, not indorsed upon the letters. And, as the Act of Parliament 1672, cap. 6, requires the parties in summons to be fully designed, otherwise that the citation shall be null; this, *a pari*, should be observed in arrestments. 2. Though the copy bears to be stamped, there is no vestige of the stamp. 3. The debtor in whose hands the arrestment was laid on, being dead, the effect thereof ceased, as in inhibitions where the inhibited party dies. Duplied for the arrester, The Act of Parliament 1672 concerns only the execution of summonses: besides, *Sir William Primrose* and *Sir Charles Erskine* is a kind of designation more certain than the general designation of *Writer in Edinburgh*;—that would be sufficient though there were many other persons of that name and employment. 2. The copy bears the stamp to have been affixed, which must be presumed true till the contrary be proven. Though the Act of Parliament required stamping, when writing was not much in use, it is not customary to use any wax; and frequently the paper is not so much as laid down, stamping being considered but as a mere formality. 3. Whatever might be prevented [pretended] for the extinction of the arrestment, if the heir had paid, not knowing of the arrestment laid in his father's hand, that cannot hold in this case, where the debt continues unpaid. The Lords found, that the Act of Parliament 1672 did not concern arrestments; and that arrestment died with the debtor in whose hand it was made, as inhibition does. But this part of the interlocutor was stopped, in order to a farther hearing the next session; and the Lords delayed to give answer to the objection about the stamping. *Vide* No. 125, [Campbell against Clark, July 1688.]

Page 15, No. 82.

1684. *March.* Sir Alexander Falconer *against* Sir David Carnegy of Pittarrow.

It was brought to interlocutor, but not determined, that an arrestment was null, because the execution expressed not that a copy was delivered either personally, or at the party's dwelling-house; but only that a copy was delivered. And, though executions are not registrate, such a solemnity ought not to be dispensed with more than in citations, which require not registration; and such omissions would render the improving of executions more difficult.

Page 16, No. 83.

1684. *March.* William Gray *against* The Relict of Bailie Deans.

In a pursuit at the instance of an assignee, it was alleged for the defender,

by persons having right to grant the servitude, or by prescription. Replied, *In-ædificatum cedit solo*, upon a special ground of law, which cannot be extended in this case to what relates to other men's lands. 2. Prescription was interrupted by a declarator for demolishing the pursuer's dam, raised at the instance of the defender's authors, who were heritors of the superior mill, and of the land in which the dam-head was craved to be fixed. Duplied, The citation not being renewed within seven years, it is prescribed by the late Act of Parliament *quoad* the effect of interruption. 2. The declarator did not conclude that the dam should be simply demolished, but to the effect it might not occasion the superior mill to stand a-back-water; and the pursuer is content to be so regulated. Triplied, The late Act of Parliament concerns only interruptions by citation posterior thereto, and not interruption by citation anterior to the act; for, had such an extension been, it would have been expressed, as was done in the preceding Act about arrestments; especially considering, that, by the former law, there was a *jus quæsitum* to the party. And laws are not always to be extended upon parity of reason; nor did the Lords of Session find a year's duty due to a superior by an adjudger, though the Act of Parliament subjected apprisers to such a duty, and such an extension of the law had been rational. 2. Albeit the declarator mention expressly, in the conclusion, to be free of the inconvenience of standing a-back-water, yet it imports a reluctancy; and no acquiescence ought to be sufficient to interrupt as to all other effects: besides, interruption being favourable for maintaining of rights, and taking off negligence, any indication should suffice. The Lords found, That citations before the late Act of Parliament needed not to be renewed within seven years; but that the declarator was not a simple interruption, but only to the effect that the defender's superior mill might not stand a-back-water.

Page 216, No. 766.

1684. *March.* Mr David Hume *against* Hume of Crossrig.

A compriser having called an apparent heir in a declarator of expiring of the reversion, the defender alleged, That the apprising was satisfied by a sale of part of the lands. Answered for the pursuer, That the defender had no interest to propone such an allegeance, without being served heir or infeft. Replied for the defender, That he, being called as a defender, and not pursuing, had good interest to allege that the pursuer's right was extinct and satisfied. The Lords sustained the reply.

Page 10, No. 47.

1684. *March.* Mr Thomas Rigg *against* Sir William Primrose.

In a competition betwixt an assignee to a debt due by the Lord Roxburgh to the Laird of Alva, and one who had arrested the same;—Alleged for the assignee, That he had done diligence against Roxburgh's heir; whereas the arrester had been *in mora*, and but lately raised his summons of forthcoming. An-

1684. *March.* ROBERT BROWN of CARSLUTH *against* JOHN IRVINE.

ONE being pursued upon his bond assigned, alleged, That the cedent, by a note under his hand, was liable to perform some obligements to the defender. Answered, The said note cannot be considered as a back-bond, but as a distinct separate obligement, seeing it is not of the same date with the defender's bond, nor contains any clause relative thereto. Replied, That it is offered to be proven, by the pursuer's oath, that he knew the said note was granted upon occasion of the said bond. Duplied, *Non relevat*, unless it were likewise proven that the note was designed to qualify the bond; it being consistent that a distinct obligement might have been granted upon occasion of the bond. This point was not determined.

Page 44, No. 197.

1684. *January and March.* WISHAW *against* The CHILDREN of LUNDIE.

ANDREW Lundie, tutor and creditor to Sir John Brown's children, having comprised his pupil's lands; the prior apprisers of that estate raised a declarator of extinction of Lundie's apprising, upon this ground, That the apprising was led, and the debt apprised for acquired, *durante tutela;* and, consequently, presumed to have been acquired by the pupil's money, till the contrary appear by the tutor's counting for intromissions and omissions. Answered for Lundie, That his omissions are discharged by Dunlop younger, the husband of Antonia, the apparent heir, to whom they belonged *jure mariti.* 2. A tutor's obligement for omissions, and accumulation of annual-rents, are personal to the pupil, and not communicable to the father's creditors by diligence; especially in this case where the pupil has renounced to be heir to her father. 3. *Esto* she had not renounced, yet a tutor's personal obligement, *ex quasi contractu* with the heir, cannot fall under the diligence of the defunct's creditors affecting the *hæreditatem jacentem*, seeing it was never *in bonis* of the defunct, but resulted, after his decease, to the pupil as creditor. Replied, All rights in the person of a debtor, that are transmissible to heirs or cessible to assignees, may be carried by the diligence of creditors; yea, even some rights, that are not cessible voluntarily, as tacks, rentals, reversions, conceived personally and taxatively, excluding assignees *per expressum*, may be so derived to creditors; as also, they may effect any personal faculty to redeem for a reasonable cause, or to uplift a sum whereof the fee is settled upon a third party, reserving a power to the granter to uplift the same, without consent of the fiar: and it were absurd to think that a debtor should have any right or obligement in his person beyond the reach of his creditor's diligence; though some personal privileges, or exceptions, not properly rights, are not cessible or derivable by diligence; such as the *beneficium competentiæ*, restitution upon minority, *jus deliberandi*, a husband or wife's revocation. 2. John, one of the pupils against whom the comprising was led, did not renounce; and so, by the diligence against him, he became debtor; and consequently the obligation of tutory may be derived to the pursuers. Nor can the sister Antonia's renouncing or revoking her service secure her, till she

purge all deeds, to their prejudice, done by herself or her husband by virtue of his *jus mariti*; and, particularly, the discharge to the tutor: so that, till this be done, the apparent heir must be liable, at least *in quantum* the discharge extends to; for, otherwise, creditors might easily be frustrated by collusion between a minor and his tutors or curators; for, after these have intromitted many years, and their discharges to tenants are got up, or lost, so as the intromission could not be proven *scripto*, the minor might renounce to be heir, and discharge the tutor or curator of omissions, whereby the rents would, in effect, be probably lost to the creditors, seeing intromission could not be proven. Now, creditors of a minor, seeing his estate to be under the inspection and management of good tutors or curators, are apt to ly by from seeking possession, in confidence that these will intromit and uplift. The Lords waved to advise this debate, and recommended it to the parties to agree; seeing Lundy, after his apprising, was obliged to continue his intromission, and would be liable to *ought and should*, as an appriser.

In this cause there was an incident reduction upon minority and lesion, at the Lady Dunlop and her husband's instance, of a contract betwixt them and Wishaw, who was at the expense of the process; which Dunlop, upon some emergent difference betwixt him and Wishaw, disclaimed: It was alleged for Wishaw, That *res* not being *integra*, Dunlop could not withdraw his name, or disclaim the process; and, if he did, ought at least to be liable for damage and interest. This point was also laid aside, in hopes of the settlement. *Vide* No. 308, [*infra, eisd. part.*] and No. 327, [June 1687, *eisd. part.*]

Page 70, No. 298.

In Wishaw's case, [*supra*, No. 298,] it was alleged, That though John, as lawfully charged, and not renouncing, became debtor, and all obligations, real or personal, due to him, became liable to the compriser, consequently the obligement of tutory for commissions and omissions; yet that, being a moveable obligement, did not properly fall under the apprising, as a habile diligence, to affect the same. 2. Antonia having renounced, at least having revoked her service, and so turned the apprising against her, to the effect of an adjudication, she is not thereby debtor to the adjudger, nor her own state or obligement liable to them; and nobody, save her own creditors, can quarrel her discharge of the tutor's omissions. Answered, 1. Though the appriser had not properly any right to John's tutor's omissions, he might apply them, by a declarator, to extinguish the tutor's apprising, as having, or ought to have had, so much money in his hands, before leading of the apprising, as was equivalent to his debt. 2. Seeing the tutor, during Antonia's time, had right to intromit as tutor to her, she ought not to be allowed to renounce, but *re integra*, and upon purging his deeds. The Lords found the tutor's omissions, during the years John lived, imputable to extinguish the tutor's apprising; but, seeing Antonia renounced or revoked, that the tutor was only liable *tanquam quilibet* for his intromission during her time; and found, That the tutor having been in possession after his apprising, he must hold compt for the rents, and be liable for *ought and should*, as other comprisers.

Page 75, No. 308.

1684. *March.* PATRICK SIM *against* LORD TORPHICHEN and CHARLES OLIPHANT.

A COMPRISING being craved to be extinguished, by intromission with rents of the apprised lands,—it was alleged, That the compriser, having entered to possession, by virtue of a wadset-right, some years before the apprising, continued to possess as wadsetter after it. Answered, The possession is to be ascribed to the apprising, as *jus nobilius*, especially where the party intromitted indefinitely, without applying his intromission to the wadset expressly by discharges; so that the other creditors were *in bona fide* not to use an order; and, if the rents should be otherwise applied than to extinguish the apprising, the estate would be carried away from the creditors for an inconsiderable sum of 500 or 600 merks, which was the ground of the apprising. Replied, Though, when annual-rents or tacks are absorbed by sovereign rights of property, their possession is to be imputed to the sovereign right; yet, in compatible rights, such as wadsets and apprisings, a person is presumed to continue his possession upon the title of his entry, until he think fit to alter the same; as was found in Bailie Justice's case. Duplied, At least the superplus-intromission, above the annual-rent of the wadset, ought to be imputed to the apprising, even from the date of the wadset, and for years before the apprising; seeing the wadsetter was obliged to pay in the superplus to the granter, and ought not to ascribe it to the stock of the wadset; especially to suffer an odious apprising to expire. The Lords did not determine this point, in respect there was another defence proponed, *viz.* that the reversion of the wadset and apprising was discharged by the defunct; and the pursuer's right flows from his heir, who is liable in warrandice.

Page 74, No. 306.

1684. *March.* JOHN GORDON *against* The LAIRD of DRUM.

FOUND that an obligement, in a contract of marriage, to employ a sum upon infeftment, &c. is moveable, and prestable by executors, whereof the heir will have relief. *Vide* No. 462, [Anderson against Cant, March 1684.]

Page 126, No. 461.

1684. *March.* JEAN ANDERSON *against* ANDREW CANT.

FOUND that an obligement to employ a sum or tocher on lands, &c. is moveable, and to be implemented by executors, whereof the heir will have relief. *Vide* No. 461, [Gordon against Drum, March 1684.]

Page 126, No. 462.

1684. *March.* PITLIVER *against* PROVOST MILN.

BROOMHALL having disponed to Pitliver an infeftment of annual-rent, out of the lands of Darsie, and an infeftment of property out of Broomhall; and having likewise disponed to Robert Miln the said right of annual-rent out of the lands of Darsie, and, *in eodem corpore juris*, a right of annual-rent out of the lands of Broomhall; there arose a competition betwixt Pitliver and Robert Miln. Alleged for Robert Miln, That he having recovered a decreet of poinding of the grounds of the lands of Darsie, before Pitliver's confirmation of the property of Broomhall, his decreet must likewise clothe the right of annual-rent, *quoad* Broomhall, which was *in eodem corpore;* and, since the registration of rights, infeftments cannot be said to be latent, so as any kind of diligence ought to clothe them with possession. Nor has the diligence any respect to the publication of the same to the lieges: for certainly a creditor's granting a discharge of money, paid to him by the debtor, relative to different rights of lands, would clothe all these with possession, whether they be *in eodem corpore* or not; of which the lieges would know little, whether the same remained private or public: and a process of poinding is a better notification to them. Answered for Pitliver, Private rights are made public, and clothed with possession the same way, since the Act for registration, as before; and though, in the case of the Lord Cardross against Van Sommerdyke, &c. March 1682, the decreet of poinding the ground was sustained to clothe the infeftment with possession as to other lands, *in eodem corpore juris*, lying in another jurisdiction; yet the payment or actual poinding followed before the competing right was clothed with possession, as in Mr Thomas Hay's case against Kettlestone's Creditors—or the lands without were contiguous with those within the regality, which is a natural, though not a formal union; nor can the process of poinding, founded on the sasine of Darsie, be considered a publication *quoad* the lands of Broomhall, which are not comprehended therein. The Lords delayed to pronounce interlocutor till the practiques were considered.

It was pleaded in this process, That Broomhall [could not] give an annual-rent out of his annual-rent out of Darsie, because that were *servitus servitutis*. But he having likewise an apprising of the property, this point was not insisted upon; nor is it solid.—*Castlehill's Pratt.* tit. *Infeftment*, No. 67.

Page 165, No. 596.

1684, *March*; & 1685, *January*. The LAIRD of HORSBURGH *against* JOHN ADAM.

IN a reduction, *ex capite lecti*, of a disposition made by a bastard, at the instance of a donator of the bastardy, upon this ground, That the disposition contained a clause dispensing with delivery, which makes it presumed to have been done *in lecto*, especially at the donator's instance, who is materially in the right of *ultimus hæres;* and bastards have not *testamenti factionem;*—the Lords found that the pursuer must prove that the defunct was *in lecto* the time of subscribing.—*March* 1684.

The debate being afterwards resumed, the Lords adhered to their former

interlocutor, unless the donator would positively offer to prove that the disposition was signed *in lecto.—January* 1685, *partibus ut supra. Vide* No. 132, [Kolstoun against Weir, November 1682.]

Page 181, No. 653.

1684. *November* 22. ———— *against* CUNINGHAME.

A TUTOR-TESTAMENTAR, who thereafter was donator to the pupil's marriage, having signed a discharge, with the pupil, of rents to a tenant, which was obtruded against him as a qualification of his acceptance of the tutory;—Alleged for the defender, That the discharge, not being holograph, was null *quoad* him, for want of writer's name and witnesses. Answered, It was a discharge to a tenant that requires not the solemnity of witnesses. Replied, Though such a discharge might be sufficient for the tenant's exoneration, it is not sufficient to make the defender liable as tutor, he not being therein designed *tutor*. The Lords, in respect of the other papers and presumptions of acceptance mentioned, No. 982, [———— against Cunningham, 12th November 1684,] sustained the discharge as a probative writ, the defender not denying the subscription.

Page 224, No. 793.

1684. *December*. SCOT *against* COCKBURN.

ONE Scot, who was about to go to Holland, having got a bill from one George Cockburn, upon a tailor there, dated in September, and payable on six days' sight; which bill being protested in November thereafter, for not-acceptance, Scot pursued Cockburn for another debt, who proponed compensation upon the bill;—Alleged for the defender, That the bill was protested. Answered, The suffering of the bill to be protested was occasioned through the pursuer's fault, in his delaying to present the same *debito tempore*. Replied, The pursuer being to carry the bill along with him from Scotland, his necessary occasion detained him in Scotland some time after the date; 2. *Esto* the pursuer had been *in mora* of presenting the bill, yet he could not be answerable for the sum therein contained, unless the defender make it appear that he had effects in the tailor's hands; for otherwise he hath no prejudice by the delay or the tailor's breaking. The Lords sustained both the replies relevant; and, the defender producing a letter from the bankrupt acknowledging his receipt of goods from him, they sustained compensation for value, in case it did appear that the pursuer was *in mora* of presenting the bill.

Page 36, No. 162.

1684. *December*. BUTTER *against* BUTTER.

JAMES Butter having taken a bond of borrowed money, in the name of his nephew, without delivering the bond, or reserving any liferent to himself, and

got a bond from the nephew for securing him of the half of the liferent of that sum, with a clause adjected, that he, James, might alter and innovate the same; which faculty he exercised in favours of another nephew, after the first's decease without children, and raised a declarator thereof against a person to whom the said first nephew had assigned the bond, particularly upon this ground, that the bond was never delivered;—Alleged for the defender, That the cedent having paid to the pursuer the half of the annual-rent for several years, upon his discharges thereof, that imported delivery, and that the pursuer had but the naked custody of his nephew's bond; and many times creditors will make assignations, and intimate them, for the assignee's behoof, and yet keep all in their own possession. The Lords recommended to the parties to settle, which they did by dividing the sum.

Page 44, No. 198.

1684. *December.* GEORGE PARK *against* INGLIS of CRAMOND.

FOUND, that if an author, called after raising of process of improbation, die before pronouncing of decreet, his apparent heir must be called, or rather the process must be transferred against him.

Page 154, No. 553.

1684. *December* 2. SIR PATRICK HEPBURN *against* MARY BRUCE.

IN a competition of adjudgers within year and day, the Lords found, That Sir Patrick Hepburn having paid only 10,000 merks to Margaret Scrimsour, for her adjudication of the lands of Ahinethy, he could only share of the price of the lands effeiring thereto, though the ground of Scrimsour's adjudication was 15,000 merks. This was a trysting interlocutor, by which Sir Patrick had so much advantage in another point as hindered him to reclaim.

Page 76, No. 309.

1684. *December* 4. ROBERT STUART *against* WILLIAM BLACKWOOD.

JAMES Denholm and William Blackwood having, by their letter of commission, ordered Robert Stuart, factor, to send them home fifteen tuns of wine, and draw bills on them for the value; the wine accordingly was sent home, and bills drawn on both of them, but only presented to and accepted by Denholm, who intromitted with the whole wine. Six years after, these bills were protested for not-payment, against Denholm, without any intimation to Blackwood: Mr Stuart pursued Blackwood as Denholm's copartner. Alleged for the defender, That he must be free, no diligence being done against him, nor the bills or protest so much as intimated to him all this time, till now that the other copartner is bank-

rupt. Answered, The pursuer might pursue, or draw upon either of the *socii*, and the defender could not deny but he knew the bills were drawn upon both, and the wine came home, conform to their joint commission; and he may blame himself he did not dispose of his own part, seeing the bills of loading were indorsed to both; and, seeing he did not meddle with the wines, he ought to have seen to the payment of the bills by Denholm the intromittor, and to have secured himself against him as to hazard by the copartnery. The Lords assoilyied the defender; which decision seems hard upon factors.

Page 36, No. 161.

1684, *December* 16; *and* 1685, *March*. Mr David Skrymzour *against* The Laird of Galdgirth.

One having prevailed with his debtor by bond, to be cautioner for him, and thereafter assigned the bond; upon which the assignee having pursued, the debtor alleged compensation or retention, till he was freed of his cautionary. Answered for the pursuer, The assignation was intimated before the defender was distressed as cautioner for the cedent; and consequently before his cautionary was a liquid ground of compensation; and the posterior distress is not *inter eosdem*. The Lords sustained the allegeance for the defender, his cautionary being after he was debtor; and it was not alleged, That the cedent was now become insolvent, to relieve the cautioner.—16*th December* 1684. Adhered to, *March* 1685.

Page 62, No. 261.

1684. *Dec.* 17. Mr Charles Lindsay *against* Cunninghamhead.

A subscribed account found not probative, and false, upon these indirect articles of improbation, *viz.* the dissimilitude of subscription, and different way of spelling words from the writer's usual subscription and method of spelling; and near forty years' taciturnity and seeking payment; albeit, *comparatione literarum*, as great a difference was observed betwixt the party's true uncontroverted subscriptions as betwixt these and that quarrelled; and the probation by witnesses was directly contrary, and equally pregnant; so that nothing of material objection seemed to remain but the long silence in requiring payment, which was but a light presumption *per se*, seeing law allows forty years to pursue.

This decision seems hard: but here the pursuer not being concerned in the account, but in another debt therein mentioned, which he was like to recover, he did not reclaim.—*Castlehill's Pratt.* tit. *Improbation*, No. 97.

Page 153, No. 550.

1685. *January.* Mr James Boyes *against* John Gillies.

Found that a bill of exchange, bearing value received, being assigned for onerous causes, the cedent's oath was not competent against the assignee, though bills be *res mercatoriæ*.

Page 22, No. 112.

1685. *January.* Andrew Martin *against* Bailie Thomas Crawfurd.

A decreet being quarrelled in the person of a singular successor to the obtainer thereof, upon this ground, That it was surreptitiously extracted, without advising the probation, that was lame and defective;—it was answered, That the decreet is opponed, bearing, that the probation was advised; and the import of a probation by witnesses cannot be re-considered now after twenty years, wherein it was never quarrelled. The Lords refused to review the probation. Yet, in the cause between the Laird of Troup and Innes, advised in January last, a part of an interlocutor being questioned by a bill the next day, before extracting,—the Lords, for clearing the grounds they went on in determining that point, read over the depositions; but found no ground to alter.

Page 109, No. 406.

1685. *January.* The Earl of Wintoun *against* The Relict and Children of Dr Livingstoun.

A general discharge, by the Earl of Wintoun to Dr Livingstoun, of his intromissions as factor or chamberlain for several years, taken off by qualifications that it was given in trust to facilitate his marriage; upon which head, bonds for 10,000 merks were also found to be granted in trust. Here the presumptions of trust were violent: for, after the date of the discharge, the Doctor had subjected himself to compt before my Lord Wintoun's auditors, had still all the instructions, and died *medio tempore* at sea.

Page 112, No. 421.

1685. *January.* David Oswald *against* James Somervel.

Found that the defender in an improbation could not, after interlocutor upon a peremptory defence, propone that the summons of wakening, at the instance of the pursuer, was raised *activè* before the pursuer had a license. *Vide* No. 551, [Sir Patrick Hume against the Vassals of Coldinghame, 8th January 1685;] and No. 554, [Semple against Semple, 15th January 1685.]

Page 154, No. 555.

1685. *January.* LORD MARSHALL and TULLOCH his DONATAR *against* THOMAS CARGILL.

AN obligement to dispone a vassal's liferent, escheat to himself, not contained in the procuratory and infeftment, found to be only personal, and not to oblige a singular successor in the superiority.

Page 166, No. 597.

1685. *January* 15. SEMPLE *against* SEMPLE of CATHCART.

FOUND that the defender, in an improbation, could not, after the taking of terms, propone this dilator, That the pursuer was out of the country, and no mandate produced. *Vide* No. 551, [Sir Patrick Hume against the Vassals of Coldinghame, 8th January 1685;] and No. 555, [Oswald against Somervel, January 1685.]

Page 154, No. 554.

1685. *January 27.* ROBERT WATSON *against* LORD KELLIE.

SIR John Kirk, being cautioner for my Lord Kellie for £10,000, bearing annual-rent, got a separate bond of relief, and being distressed, gave a bond of corroboration to the creditor: Robert Watson, donator to Sir John Kirk's single escheat, pursued a special declarator against my Lord Kellie's heirs. Alleged for the defender, That the bond of relief fell not under the single escheat, seeing it ought to be considered of the nature of the principal bond, which was heritable *quoad fiscum*, by bearing annual-rent; 2. Distress, without actual payment by the cautioner, is not sufficient to make the sums of relief to fall to the donator of his single escheat *in causa pene infavorabili*, though a simple distress, *quoad* some favourable effects, be sufficient to make him creditor. Answered, The bond of relief is moveable, seeing it contains no obligement to pay annual-rent formally; and the obligement of relief among cautioners in an heritable bond, is moveable, and, after distress, falls under executry and escheat, &c.; 2. The not actual payment doth not alter the case; for, upon distress, there is *obligatio pura et actio nata*, which falls in escheat as other moveable bonds. The Lords found the obligement of relief did not fall under escheat, unless the rebel had paid the debt; which defence was sustained at the debtor's instance, neither cautioner nor creditor competing. This decision seems irregular.—*Castlehill's Pratt.* tit. *Escheat*, No. 65.

Page 115, No. 433.

1685. *January 27.* The CASH-KEEPER *against* CAPTAIN M'REITH.

IN a competition between one who was creditor to a rebel before his rebellion, and had, after it, obtained a decreet of mails and duties against his tenants and

the donatar of the liferent escheat, who had raised a general and special declarator after the other's decreet;—The Lords preferred the creditor, in respect of his legal diligence, for the same reason that an arrester would have been preferred; though there seems to be this difference, that an arrestment is *nexus realis afficiens rem;* whereas the decreet gives no real interest in the mails and duties till they be recovered: and this point of fact was not clear, whether the mails and duties were for terms subsequent to the annual rebellion, after which the right of liferent in the superior's person is considered as a real public right of the lands, and consequently would carry the duties, and be preferred to a posterior apprising, or voluntary right confirmed, *multo magis* to a personal creditor of the rebel's.

Page 115, No. 484.

1685. *February.* FRANK *against* CUNNINGHAM.

IN a competition for mails and duties betwixt one Cunningham an appriser, and Mr John Frank, as having right from Mr Moubray and his wife to another apprising, whereof she was fiar;—it was alleged for Cunningham, That Mr Frank's right was posterior to a written declaration granted by Mr Moubray, whereby he acknowledged his intromission with more of the mails and duties of the lands apprised than came to his share; and that he was willing that Cunningham, the other appriser, should intromit with the whole mails, till he received as much as Moubray had uplifted more as his share; which written declaration imports materially an assignation, though the paper be not formal; and Moubray's *jus mariti* was conveyable by assignation. Answered for Frank, That the right to Cunningham was but a factory, and could not be obtruded against a singular successor in the right of apprising. The Lords sustained the paper as an assignation.

Page 22, No. 114.

1685. *February.* LORD GRAY *against* The EARL of LAUDERDALE.

THE Lords reduced a right upon a reason of concussion, where there was no transaction or abatement.

Page 155, No. 557.

1685. *February.* JAMES CLELAND *against* PITLIVER.

FOUND, that, in a competition of base infeftment of annual-rent, the first citation and day of compearance before the Lords, was preferable to the posterior citation and first decreet before the inferior judge, where the procedure is more summary than before the Lords. 2. Found, that, in voluntary rights, the first presenting of a right for confirmation was not to be considered, in order to give preference among base infeftments, which is ruled by the date of the charter and seal, because superiors are not obliged to confirm voluntary rights.

Page 166, No. 600.

1685. *February.* LADY BARNCLEUGH *against* CREDITORS.

A RELICT having pursued an adjudication of her husband's lands, upon his obligement, in their contract of marriage, to relieve her jointure-lands of all incumbrances, that she might come in within year and day of his other creditors adjudgers;—it was Alleged for the other creditors, That she could not adjudge for relief, because there was no distress;—and 2*d*, The quantity of the distress that could emerge was not liquid. Answered, The grounds of distress were obvious, *viz.* infeftments prior to her right; and the grounds of the distress must be supposed as large as the ground of the infeftments, and consequently liquid. The Lords, considering that the relict would be absolutely cut off, if she came not within year and day, and there being nothing said against the grounds of the distress condescended on, allowed her to adjudge for the whole, with this express provision, That her adjudication should only take effect in so far as distresses did emerge, and the legal should run from the time of actual distress.—*February* 1685, *Lady Barncleugh against Creditors.*

And, in November 1685, the Lords sustained an adjudication with the like provision, at a cautioner's instance, who was distressed by a charge of horning, but had made no payment. *Vide* No. 360, [Mary Bruce against Sir Patrick Hepburn, January 1684.]

Page 77, No. 316.

1685. *February* 12. HISLESIDE *against* LITTLEGIL, &c.

ONE Mitchel having received, upon his granting a back-bond, an assignation from Littlegil, to a bond of 4000 merks, due by Hamilton of Binnie as principal, and Hisleside as cautioner, and having pursued the cautioner, the defender proponed compensation and payment to the cedent in general; thereafter Littlegil assigned Mitchel's back-bond to Duke Hamilton and his creditors; and, before the term for proving the defence of payment and compensation, Hisleside, the defender, obtained a decreet of *male appretiata* against Littlegil; at the advising whereof, it was alleged for the assignees to the back-bond, 1. That the process being now for their behoof, the decreet against Littlegil could not meet them; seeing, when their assignation was intimated, the debt of *male appretiata* was not liquid by a sentence, and so cannot be a ground of compensing the debt due to them by the defender. 2. The defence of payment was but made in the general, without any special application to the debt of *male appretiata.* Answered for the defender, Littlegil, or Mitchel his trustee, could not prejudge the defender by any assignation, after the matter was litigious by litiscontestation upon the defence; and the term allowed against Mitchel to prove the defence of payment, consisting *in facto*, must be effectual against the assignees to his back-bond. 2. The exception of payment and compensation, in general terms, was sufficient, the pursuer not having craved the defender to be special as to the ground it was founded on: besides, the defender would lose his debt, if it was not sustained against the assignees, now that Littlegil is insolvent. The Lords sustained the answer, and found

that the compensation meets the assignees, as [it] did Mitchel or Littlegil; and, there being other grounds of compensation not liquid, the Lords allowed the defender a fortnight to liquidate these, superseding extracting in the meantime. Here the defender's case was favourable, to be free of cautionary paid by the sale of Binnie, the principal debtor's lands; where Hugh St Clare, who, by virtue of a factory, sold the estate, and paid the debt, took assignation to the bonds, and transferred them to Littlegil.

Page 62, No. 162.

1685. *February* 13. JOHN JOLLY *against* The LAIRD of LAMINGTON.

IN a process of forthcoming, at the instance of one Jolly, against the Laird of Lamington, as debtor to Robert Baillie, the pursuer's debtor, compearance being made for Theodore Montgomery, who had right by assignation, intimated before the arrestment; the pursuer proved, by the assignee's oath, that assignation was a trust for Robert Baillie's behoof; after which Lamington, having taken a discharge from Theodore, and proponed upon the same, the Lords found, that Lamington was *in mala fide* to disappoint the arrester, by making voluntary payment to the assignee, after he knew the assignation to be trust, and after the matter was litigious betwixt the assignee and arrester; and therefore decerned in the forthcoming.—*February* 1685.

It was afterwards alleged for Lamington, That the discharge was granted before Theodore gave his oath; and Lamington protested against his deponing, as being denuded. Answered, The defender was *in mala fide*, after the arrestment, to take a discharge, and ought to have suspended upon multiplepoinding; 2. The defender's oath of calumny is craved, that the discharge is not of the date it bears, and, being *falsum in data quam præ se fert*, must at best be looked upon but as blank in the date; so that the defender must prove it was of a date anterior to Theodore's deponing. The Lords sustained both replies; and found, that the defender could not take a discharge in prejudice of the pursuer, after the matter was litigious.—*February* 1685.

Page 16, No. 84.

1685. *February* 13. SIR GEORGE LOCKHART *against* SIR JOHN CLARK of PENNYCOOK.

JAMES Clark, having disponed his lands of Wrightshouses to his brothers, Sir John and William, some years ago, and thereafter, Sir John having taken an heritable bond of annual-rent out of these lands, for the sum contained in the disposition, and other sums then advanced; they forbore to take infeftment till James was broken, and then they infeft themselves upon both rights; and, the day after, Sir George Lockhart was infeft in an annual-rent upon James Clark's bond. There arose a competition betwixt Sir George and the two brothers of the common debtor. Alleged for Sir George Lockhart, That he ought to be preferred, in respect the brothers' delay to infeft themselves, to cover James's trade

in borrowing money, was fraudulent; 2. The posterior right of annual-rent is incompatible with the first right of property, proceeding from the same author, seeing *res sua nemini servit*, and it imports a passing from the first; 3. Sir George's infeftment, though a day posterior, was first made public by a summons of poinding the ground formally executed; whereas Sir John Clark's right could not be habilely clothed with possession by his summons of mails and duties. Answered for Sir John Clark, That he might take infeftment when he pleased on his disposition for an onerous cause; and his delay to take infeftment can infer no presumption of fraud, James Clark being a trading merchant, who had a considerable stock, and broke by reason of cautionary for John Muir and others, whose affairs went suddenly in disorder; 2. The bond bears an express clause and provision, that the taking of annual-rent should not be understood a passing from the right of property; but it might be lawful for him to use both, or either, as he thought fit; 3. In defence of rights, one may use inconsistent titles;—*December* 22, 1674, *in the case of Sommervell; March* 1684, *Pitliver against Provost Miln;* 4. The summonses are opponed, which are applicable to both rights. The Lords sustained the second and third allegeance proponed for Sir George Lockhart, and found, that the right of property was passed from by taking the posterior annual-rent, and that a summons of mails and duties did not clothe an infeftment of annual-rent with possession; and therefore preferred Sir George.

Page 166, No. 598.

1685. *February* 27. AUCHINBRECK *against* ROBERT CAMPBELL.

IN the process of mails and duties, at the instance of Auchinbreck, as having acquired right to an apprising against his father, against the tenants, compearance was made for his father's creditors, who alleged, That the comprising was redeemable from the pursuer, the apparent heir, for the sums he paid for it. Answered for the pursuer, The act of Parliament about the redemption of aprisings acquired by apparent heirs, concerns only the taking right to expired apprisings, which is presumed to be done in defraud of creditors; whereas the pursuer's apprising was acquired *in cursu* of the legal, and several years on't are yet [to] run. Now, there being in this case a *remedium ordinarium*, by using an order, there is no necessity to recur to the extraordinary remedy of the Act of Parliament; and creditors have no more prejudice by the apparent heir's having the right, while it is redeemable, than if it were in the person of a stranger. Replied for the creditors, The presumption of a fraudulent contrivance, for the benefit of apparent heirs, holdeth in the case of current as well as in the case of expired apprisings; for there might have been partial payments of the apprising acquired, the instructions whereof the apparent heir, being master of all the papers, may suppress; and it will be difficult for creditors to prove that the apparent heir gave not the full value for the apprising, otherwise than by his own oath. It might also fall out, and be industriously ordered, that the apparent heir should not take right to an apprising, till it were near upon the expiring. Besides, the case of creditors, who are *in damno vitando*, is more favourable than that of an apparent heir, who is *in lucro captando*. And,—*July* 21, 1671, *Sir*

George Maxwell of Pollock against Kirkonnel,—the Lords found an apprising acquired by an apparent heir, during the legal, redeemable, within ten years from the time of acquiring, for what was truly paid for it, if it stood in his person till the legal were expired. The Lords found the apprising redeemable from this apparent heir, upon payment of the sums he truly gave for it.

Page 11, No. 49.

1685. *February* 28. SINCLAIR *against* SINCLAIR.

FOUND that payment of a debt by a debtor, or uplifting of mails and duties, in satisfaction of back tack-duties of an improper wadset, by virtue of an assignation from the debtor, after diligence was done against him by another creditor, did clothe a base right with possession, although the duties might be repeated upon the Act of Parliament 1621, as gratifications after diligence.

Page 166, No. 599.

1685. *March*. PATRICK HOUSTOUN *against* WILLIAM M'KIE.

ONE being pursued as *se gerens pro hærede* by intromission with the pursuer's deceased debtor's rents, he alleged, That he was but a second brother, and so could not be heir. Answered for the pursuer, The elder brother having been eighteen years abroad, without any account of him, is reputed to be dead; and so the defender is now apparent heir. The Lords sustained the defence, and found the pursuer could not, *hoc ordine*, call for the defender's intromissions, but ought to adjudge the lands, or arrest the rents.

Page 11, No. 50.

1685. *March*. WILLIAM BOGLE *against* BAILIE HALL and MR BOWDEN, LONDONER.

IN the process of forthcoming, at the instance of one Bogle, who had arrested some tobacco in the hands of Bailie Hall, as belonging to William Johnston, the pursuer's debtor, compearance was made for Mr Bowden, who alleged, That the tobacco was his, and only consigned in the hands of William Johnston, as his factor and correspondent, and so could not be carried by an arrestment at the instance of Johnston's creditors. Answered, Possession in moveables imports a right; and it is three years since the tobacco came into Johnston's possession. The Lords sustained the allegeance made for Bowden as relevant.

Page 16, No. 85.

1685. *March.* The College of St Andrew's *against* Ramsays and their Husbands.

One Ramsay having alienated his estate, by way of mortification, to the College of St Andrew's, who pursued his heirs to denude themselves of it;—Alleged for the defender, That the deed was never delivered, nor contained a clause dispensing with the not delivery, nor yet reserved a power to alter and innovate; but was found lying by the defunct, at least in the hands of a schoolmaster, to whom he had given it to write two other duplicates; and, by a provision in the mortification, the defunct and his heirs were to retain one double, and the other doubles were not subscribed. Answered for the pursuer, 1. It was rational for the mortifier, who had reserved his own life-rent, to retain the deed, especially he being patron of the mortification; 2. Ramsay wrote a letter to the College, declaring, *per verba de presenti*, that he had mortified the lands to the College, for educating some bursars; and, upon that insinuation, recommended a bursar to the College; which latter is equivalent to delivery; and the recommending of the bursar is an exercise of his right as patron of the mortification; and mortifications are favourable. The Lords, before answer to the debate, recommended to some of their number to settle the parties.

Page 28, No. 136.

1685. *March.* Alexander Bothwell *against* Mr George Rome.

James Clerk having given a letter of credit on George Rome, factor in London, to advance to Bothwell £40, if he stood in need on't; Bothwell drew a bill on Clerk, payable to James Rome, George's brother; which bill being protested, and Bothwell pursued for not-payment, it was alleged for him, That the money given for the bill being truly employed for Clerk's use, whose apprentice the drawer had been, and George Rome being debtor to Clerk, the drawer ought to have compensation upon the debt due to Clerk. Answered, That compensation is only competent *inter eosdem;* and James, and not George Rome, is creditor in the bill, for an onerous cause; 2. Clerk's escheat is gifted. The Lords found, by the letter of advice sent with the bill, that the bill was for George Rome's behoof; and therefore found the defender's allegeance relevant to be proven, that James Clerk, who is now bankrupt, was creditor to George Rome, and that the money got by the credit was expended for goods to Clerk.

Page 36, No. 164.

1685. *March.* Skelmorly *against* His Brother Archibald.

Old Skermorly having given a bond of provision, to his second son, of 8000 merks, and thereafter paid him 2000 merks, and took his bond for the same as so much borrowed money; after his death the second son agreed to take from his eldest

brother 6000 merks, in place of the 8000 merks in his bond of provision, without any mention of the 2000 merks' bond: the young Laird being pursued for the 6000 merks, he proponed compensation on the 2000 merks' bond; and the pursuer having proven, by the defender's oath, that the restriction of the 8000 merks' bond of provision to 6000, was made without any payment of money, or onerous cause, on the defender's part;—the Lords repelled the compensation upon the 2000 merks' bond, in respect of the abatement of the sum in the bond of provision; because *debitor non præsumitur donare*, unless the defender would prove, by the pursuer's oath or writ, that the 2000 merks of abatement was gifted. *Page* 45, No. 201.

1685. *March.* Robert Burnet, W. S. *against* M'Lellan.

The Lords found, That, to infer compensation *inter easdem personas*, it is not enough that the compenser had an assignation in his person before the other party's cedent was denuded by assignation, unless he could say that it was intimated before intimation of the other's assignation; for the cedent is not fully denuded without intimation.

It was debated in this cause, That infeftment having followed upon a bond of corroboration, compensation could not be founded on the debt corroborated, as not being *ejusdem qualitatis* with the other moveable sum craved to be compensed. Answered, The compensation is founded on the principal bond, whereon no infeftment was passed; and the principal debtor did not subscribe the bond of corroboration, so as the moveable quality of the first bond was not altered thereby. The Lords were clear to have sustained the sums compensable, notwithstanding the infeftment following upon such a corroboration; but the cause was determined upon the first point.

Page 63, No. 263.

1685. *March.* Sir Robert Baird *against* Barram.

A comprising found simply null, for that the lands were denounced at the wrong cross. Here it was doubtful where the lands lay. *Vide* No. 299, [Calderwood against Frank, January 1684; Dict. 3728.]

Page 76, No. 313.

1685. *March.* The Earl of Northesk *against* Sir Patrick Hepburn.

In a competition between Sir Patrick Hepburn, who adjudged, without taking infeftment, Dougal M'Pherson's adjudication of some lands, whereupon no infeftment had followed, and my Lord Northesk, who two years after also adjudged from Dougal, and took infeftment;—Alleged for Sir Patrick, That an adjudication without infeftment, being transmissible by assignation, an adjudica-

tion thereof is a legal assignation, carrying the right, and needed no infeftment. Answered for Northesk, That not only had Dougal an adjudication, without infeftment in his person, but Sir Patrick, before his own adjudication, stood infeft in a right in trust for Dougal, so as Dougal, the common debtor, must be considered as having infeftment in the lands; and therefore Northesk's adjudication being completed by infeftment, it is the first effectual right; and Sir Patrick's, though prior, can only come *in pari passu*. Replied for Sir Patrick, *Esto* the infeftment was intrusted for Dougal,—the right, in his person, by the back-bond, not being real, but only a personal obligement to force Sir Patrick to denude, the same fell under Sir Patrick's adjudication, which needed no infeftment to complete it; and Northesk, being without year and day, could not come *in pari passu*. The Lords sustained the allegeance made for Northesk; which is irregular.

Page 77, No. 314.

1685. *March.* Lord Kemny *against* Mr Thomas Rigg.

Found that a husband's *jus mariti* and courtesy, though transmissible by assignation, as moveable rights, are apprisable *habili modo;* just as tacks for years are, *habili modo*, apprisable, or adjudgeable, though moveable *quoad* other effects.

Page 77, No. 315.

1685. *March.* Gordon, Parson of Banchory, *against* The Laird of Elsick.

A decreet being quarrelled upon this ground, That the Lords had mistaken the probation, in finding a piece of burnt land to lie within the pursuer's march, which is convelled by ocular inspection;—the Lords recommended an amicable settlement to the parties, and, in case that took no effect, appointed two of their number to make a new visitation.

Page 109, No. 407.

1685. *March.* The Duke of Queensberry *against* The Representatives of Mr John Finlay.

The Duke of Queensberry having pursued the representatives of one of his father's chamberlains, to count and reckon for his intromissions, the defender produced a general discharge, after the years of his factory, discharging all intromissions as factor or chamberlain, and acknowledging count, reckoning, and payment. Alleged for the pursuer, That the said discharge was but granted in trust, as appears from the granters not retiring the instructions. The Lords, before answer, ordained the pursuer to condescend and instruct his several qualifications of trust.

Page 112, No. 420.

1685. *January and March.* The EARL of MARSHALL and JOHN TULLOCH his DONATAR *against* THOMAS CARGILL.

IN a general declarator of liferent-escheat, at the instance of the Earl of Marshall, and John Tulloch his donatar, against Thomas Cargill of Auchtidonald, vassal to the Lord Marshall;—it was alleged for the defender, That he had a clause in his rights obliging the late Lord Marshall to dispone the casualties of the defender's escheat, or discharge the same as often as it should fall. Answered for the pursuer, That the obligement is but personal in the disposition, and not repeated in the procuratory of resignation and sasine, either expressly or *relative* to the provisions in the disposition, and so cannot oblige the Lord Marshall a singular successor. The Lords repelled the defence, in respect of the answer; *January* 1685, *and March* 1685. The like, *in terminis*, found in the case of George Davidson, donatar by James Oswald, against John Gilmour. —*March* 1685.

Thereafter it was alleged for Thomas Cargill, That there being a reduction raised of the horning upon which the escheat fell, it ought to be found null, in respect the ground of the charge was an assignation to a matter of £40 or £50 of bygone annual-rents, flowing from one who was formerly denuded by an intimated assignation in favour of another person, and so was *a non habente potestatem*; besides, the decreet was recovered against the rebel when he was minor. Answered for the pursuer, That the escheat is inferred from the contempt of the charge, although the debt be not due; for the defender ought to have suspended. Replied, A horning will be reduced upon a prior discharge, though the party charged may be said to be guilty of contempt and negligence, for not suspending; and from the same reason it may be pleaded, that this horning is null for want of a title in the charger's person. Again, it were hard the defender's liferent-escheat, of 1000 merks yearly, should fall upon the account of a pretended debt of £40. The Lords did not determine this point; but they inclined to repel the reason of reduction.—*March* 1685.

Page 114, No. 431.

1685. *March.* DICKSON of HARTRY *against* BROWN.

IN a competition betwixt an arrester of the goods of his debtor dying before the forthcoming, and an executor-creditor who had confirmed these goods; the executor-creditor craved to be preferred, in respect the goods remained *in bonis defuncti*, notwithstanding the arrestment; and the confirmation was the first habile complete diligence. Answered, Though, in a competition of arrestments, the first complete diligence is preferable,—a bare arrestment, which is *nexus realis*, is preferable to a desperate diligence, just as the assignee to a sum would be preferred to one confirming the same as *in bonis* of the cedent, who died before intimation of the assignation. The Lords inclined to prefer the arrester; but the vote was delayed.

Page 127, No. 466.

1685. *March.* JAMES SAMUEL *against* SIR JAMES ROCHEAD.

AN assignee to a bond, whose assignation was reduced for not being subscribed by two notaries, having got infeftment out of the debtor's lands, and transferred his right to Sir James Rochead, who compeared after pronouncing of the decreet, and craved to be heard against the probation led for making void the assignation;—the Lords did not admit Sir James Rochead's interest in this state of the process, in respect it was not sooner intimated.

Page 155, No. 559.

1685. *March.* ROSS of TILLISNAUGH *against* GARDIN of MIGDSTRATH.

IN the improbation, at the instance of Ross of Tillisnaugh against Gardin of Migdstrath, of a bond of thirlage, upon this direct article, That the defender had sometimes alleged upon a temporary bond, and at other times had shown a perpetual bond, which had been quarrelled by those who saw it, as not bearing the true subscription of the deceased Alexander Ross, the alleged subscriber, and which the defender refuseth now to produce; and the bond produced by him is, by vitiation, made a perpetual of a temporary bond, and was given in so vitiated to the register by him; all which was proven;—the Lords found the bond produced, not only not probative, but also false, in respect of the vitiation *in substantialibus*. But they did not remit Migdstrath to be criminally punished, but left it to the advocate to raise an indictment before the justices, and lead what probation he thought fit: Albeit Migdstrath had abidden by the bond, in respect it was an evident granted to his predecessors, and it was not clearly proven that he had made the vitiations.

Page 155, No. 560.

1685. *March.* LADY KETTLESTON *against* JOHN HAY.

MR Thomas Hay having advanced his sister, the Lady Kettleston, £1400, at several times in small sums, who, at the foot of an account thereof, acknowledged the above-written sums were truly delivered to her, but did not oblige herself to repay the same to him; she pursued his heirs, who obtruded the said declaration, and she alleged her brother had her own money in his hand. The Lords found the subscribed acknowledgment did not import an obligation.

Page 224, No. 795.

1685. *March.* SMITH of INVERAMSAY *against* ABERCROMBY.

THE Lords rejected an order of redemption; for that the instrument of pre-

monition did not bear the procuratory was shown or offered; the cause being favourable, and it was not alleged that the procuratory was called for.

Page 242, No. 849.

1685. *March.* LADY ANNE GORDON *against* The EARL of ABOYN.

THE Earl of Aboyn being pursued by Lady Anne Gordon, as representing his father, who was factor for the pursuer, and so liable to do ordinary diligence for uplifting the rents of her locality, which are now become desperate by the poverty of tenants, seeing *mandatarius tenetur ad talem fidem et diligentiam in rebus mandatis qualem præstare solet in suis*;—Answered for the defender, That, by the quality of the factory, he was liable for actual intromissions allenarly, and could not be obliged to intromit; and his service was gratuitous. The Lords sustained the answer for the defender.

Page 258, No. 914.

1685. *March* 12. GENERAL DALZIEL *against* The EARL of MARR.

IN a competition between a prior infeftment of relief, without possession or confirmation, and a posterior public infeftment confirmed,—Alleged for the infeftment of relief, That, seeing the same was not a title of possession till after distress, it must be reputed public *ab initio*, unless, after distress, the party had been *in mora* to possess: just as an infeftment of annualrent would be preferred to a posterior voluntary [right] clothed with possession before the term of payment of the annualrent, seeing the annualrenter could not possess till the term; and the want of possession cannot infer simulation. Answered, The infeftment of relief might have been made public, *ab initio*, by confirmation; and, as a confirmation, prior to another right attaining possession, will make the first preferable right, so an infeftment of relief should be made public by confirmation or declarator. The Lords inclined to prefer the infeftment of relief for the reason above mentioned; but the point was not voted.

In this competition, it was further alleged, That the confirmation of the infeftment of relief was of a date posterior to the other's confirmation; yet that can only be considered from the date of the superior's delivery of it to the party, and not from the date of his subscription, otherwise it might be in the power of superiors to let confirmations ly subscribed several years by them, and prefer creditors as they think fit. Answered, Seeing the superior's confirmation requires not to be published, but may be kept private by the obtainer, and the design thereof is only to have the superior's consent, after the charter is signed and the composition paid, it is looked upon as the party's evident from the date of the subscription; and the priority and preference of confirmations in exchequer is ruled according to the date and sealing, without respect to the delivery. The Lords found the allegeance of not-delivery relevant; and that confirmations granted by private superiors are to be considered from the date of delivery to the party, or some to his behoof, and not from the date of subscribing. Which

decision seems not very well founded.—*Castlehill's Pratt.* tit. *Infeftment*, No. 72.

Page 166, No. 601.

1685. *March* 18. LORD MARR *against* JOSEPH BRODY'S SON.

IN a competition, it being alleged, That a poinding of the ground at Candlemas, upon Brody's infeftment the 21st of December preceding, for the annual-rent fallen due at Candlemas, did not clothe the infeftment with possession; because that made not a complete term's annual-rent. Answered, The ground may be poinded, after the term of payment, for any proportion of annual-rent fallen due before, though but a month or a week's annual-rent; and, consequently, the infeftment is thereby clothed with possession. The Lords sustained the reply for Brody, and preferred him to the other annual-renter, whose right was clothed with possession after that Candlemas.

Page 167, No. 602.

1685. *March* 20. DICKSON of HARTRIE *against* DICKSON of WHITSLEAD.

A DISPOSITION by a father to his son and apparent heir, was reduced upon the Act of Parliament 1621, at the instance of the granter's creditors, though it was made in implement of the son's mother's contract of marriage; because obligements in contracts, by way of destination, cannot be obtruded to creditors.—*20th March* 1685. This was afterwards stopped.

Page 155, No. 558.

1685. *March and November.* M'KIE *against* SHAW and KER.

AN arrestment of a parcel of sheep in the debtor's own hand, found not to prescribe in five years, as an arrestment laid on in a third party's hand would do.—*March* 1685. And, in November 1685, the just contrary was found in this cause.

Page 17, No. 87.

1685. *November.* LORD YESTER *against* LORD LAUDERDALE.

IN the adjudication, at the instance of my Lord Yester against the estate of the Duke of Lauderdale, upon a *cognitionis causa*, and my Lord Lauderdale's renouncing to be heir, compearance was made for Lauderdale, who, as a creditor to the Duke, craved to see the process in common form; for it was the first adjudication. Alleged for the pursuer, That an adjudication can only be re-

quired to be seen in common form by the debtor; and creditors must hold themselves content with seeing in the clerk's hands. The Lords ordained the first adjudication, whether upon the old or new Act of Parliament, to be seen in common form, if desired, either by the debtor or a co-creditor.

Nota. Though there be a former apprising or adjudication, an adjudication after year and day thereof ought not to pass summarily, and of course, but must go to the roll—seeing such a posterior adjudication is not concerned in the running of the year, to come *in pari passu.*

Page 2, No. 9.

1685. *November.* JOHN DICKSON *against* JAMES AITCHESON.

ONE Aitcheson being infeft in a house in Kelso, upon a disposition from Dickson, which happened to be burned before he attained possession; and the seller having pursued for the price,—Aitcheson suspended on this reason, That he was never in possession, and therefore the loss, by the burning of the house, must ly upon the seller. 2. A part of the price was remitted to third parties, and not yet determined by them; so that the bargain was incomplete. Answered, A sale being perfected, *periculum rei venditæ ante traditionem sequitur emptorem;* and, by delivery of the disposition, the bargain was perfected; and the danger should have followed the buyer, though he had not been infeft; *multo magis* where he was infeft, and present producing the disposition. Besides, the tradition of earth and stone was a symbolical possession; and, if need were, it could be made appear that possession was offered by instrument. 2. The referring a part of the price to the arbitrament of a third party hinders not the consummation of the bargain. The Lords found the letters orderly proceeded against the buyer. *Page* 29, No. 139.

1685. *November.* GEORGE GOWAN *against* MARGARET FORREST.

A WIFE's father having obliged himself, in her contract of marriage, to pay the tocher to her and her husband; and she, twenty years after the husband's death, having pursued his heir to make up the deficiency of her jointure;—Alleged for the defender, The tocher being payable to the wife as well as to the husband, *sibi imputet* that she did not recover payment before now; that the father, the debtor, is insolvent; and the clause in the contract, that the husband is to add to the tocher, imports the condition of payment thereof. Answered, The making it payable to the wife was but a compliment, and, *jure mariti,* it accreseed to the husband. Again, she was not *valens agere* during the marriage, nor obliged, either before or after, to do diligence. The Lords found the negligence only to be imputed to the husband and his heirs, and not to the wife; and therefore repelled the defence. *Page* 97, No. 375.

1685. *November.* REACH *against* POLWART.

A RELICT having, as executor-creditor to her husband, pursued his son of a former marriage for the sum in a bond, which she proved, by his oath, he had taken out when his father was dying, and [got] renewed in his own name, without any assignation from the father;—Alleged for the defender, That he, being creditor, by his contract of marriage, to his father, anterior to the pursuer's marriage, might take payment from him, or a bond to be delivered to the father's debtor, upon which the defender might get payment, or new security; 2. The defender has a gift of his father's escheat. Answered for the pursuer, It is not denied but the defender might have received payment or assignation from his father; but the bare having of the bond imports not the transmission of a right thereto, especially when it appears not, by writ or witnesses, that the father delivered the bond *ad hunc effectum*; 2. The pursuer was confirmed executor-creditor before the gift in favours of the defender; and all the legal diligence of creditors affecting moveables, anterior to the gift of the debtor's escheat, are preferable to the donator. The Lords sustained the second answer made for the pursuer, which did determine the cause without necessity to consider the first. *Vide* No. 457, [Auld against Smith, February 1684.]

Page 127, No. 467.

1685. *November* 11. PITTRICHIE *against* UDNEY.

IN a process for damage, against a person who induced the pursuer to take a cautioner, whom the defender knew at the time to be insolvent;—the Lords rejected the summons as not relevant, though all was referred to the defender's oath.

Page 258, No. 915.

1685. *December.* LORD YESTER *against* LORD LAUDERDALE.

MY Lord Yester and his Lady having craved a decreet, *cognitionis causa*, against the Lord Lauderdale, upon his renunciation to be heir to the Duke his brother;—it was alleged for the defender, That he, as a personal creditor to the Duke, had interest to stop decreet and adjudication, by alleging that the debt was paid, in so far as the £10,000 sterling, contained in the Lady Yester's bond of provision, was innovate or implemented in her contract of marriage, wherein £12,000 of tocher was contracted for her by the Duke; and *debitor non presumitur donare.* Answered for the pursuer, That he could not be hindered to constitute his right against the Duke, whom the defender had renounced to be heir to; and he was willing all defences should be reserved to the defender, in so far as he is creditor to the Duke *contra executionem.* Replied for the defender, *Malitiis non est indulgendum;* and the pursuers, without any visible advantage to themselves, would greatly prejudge the Duke's

creditors, seeing the passing of one adjudication would oblige all the creditors to do the like, whereby expenses would be accumulated, and the estate rendered less able to pay all the debts; and the defender was content to have debated the pursuer's interest, which they refused. The Lords sustained the defence for the personal creditor, if instantly verified.

Page 2, No. 8.

1685. *December.* CHRISTIAN MICHIE *against* Mr JOHN RICHARDSON.

A WIFE, by her contract of marriage, being provided to a liferent of the whole conquest, with a provision that she should do no deed without consent of Sir James Dundass of Arnistoun;—the husband acquired tenements to the value of £700 or £800 a-year; and she, a little before his death, renounced and restricted the liferent to £300, free of all public burden, in favours of her husband, and ratified the deed judicially upon oath. She and her second husband raised reduction of her renunciation, upon these grounds:—1. It was done, *stante matrimonio*, and so revokable; 2. It was done without consent of Sir James Dundass, to whom, by the husband's consent, she was interdicted. Answered, She cannot be reponed against her ratification by oath, which is *vinculum spirituale*; 2. The provision in the contract imports no interdiction, nor is it conceived *irritanter*. Replied, By our law, wives can do no deeds unless authorised by their husbands or friends, and the husband could no more authorise her *in rem suam*, than a curator could authorise his minor; 2. By the civil law, wives, in respect of their frailty, have a privilege of revoking all their deeds of intercession, either for their husbands or third parties, *per senatusconsultum velleianum*; and they are secured against all deeds in favours of the husband *per orationem Antonini, ne mutuo amore se spolient*. And the oath doth not hinder revocation of deeds in favours of the husband, more than the revocation of personal obligements to pay sums, which do not oblige the wife, though granted to third parties with her husband's consent, and ratified upon oath; 3. The Act of James III, Par. 11, respects only the case of alienations made to third parties, with the husband's consent, which, if ratified by oath, are not revokable; and doth not concern deeds granted to the husband, without being lawfully authorised; 4. The provision in the contract, requiring Arnistoun's consent, was, in effect, a real interdiction, *quoad* the husband who consented to it, needing no publication. And it was *contra fidem et in fraudem contractus*, for him to do any deed contrary to the provision, which was expressly designed to obviate his taking advantage of his wife. And whatever might be said of a wife's renunciation to her husband, upon equal and rational terms, where she reserves a competent subsistence; here there is enorm lesion *ultra dimidium*, the wife having restricted her liferent of an opulent conquest to £300. Duplied, By our law, wives, though they cannot oblige themselves personally for sums, they may validly contract, and denude themselves of rights standing in their persons, either in favours of their husbands, or other third parties with consent of their husbands. And though deeds, with consent of their husbands, in favours of third parties, judicially ratified without oath, are considered as revokable, the interposing of an oath excludes all revocation. And the difference betwixt a wife's

personal obligement to pay a sum, and her disposition or renunciation of rights in her person, lies in this, that the former is, *ipso jure*, null without revocation, and cannot be confirmed by an oath, which is not *modus inducendi, sed adjuvandi obligationem;* whereas a wife's deed, in relation to an estate in her person, subsists in law, and is confirmed *morte*, if not revoked; and so is confirmable, and rendered irrevocable by an oath. And as *sacramenta puberum* hinder restitution upon minority, so a wife's oath ought to exclude her revocation: for, in the opinion of all lawyers, privileges introduced *primario in bonum privatum*, may be passed from by judicial renunciations, which many think sufficient without oath: but the adjecting of an oath makes them altogether irrevocable. 2. The parallel doth not hold between husbands and curators; for though a wife, in duty and decency, should do nothing without her husband's consent, that is not necessary to her deeds, except in so far as he may be concerned or prejudged;—for processes at wives' instance against their husbands have been sustained; witness the Lady Wamphrey's reduction of her contract of marriage upon minority;—and inhibitions at a wife's instance, against her husband notourly *vergens ad inopiam*, for implement of her contract of marriage, where no person was named therein, at whose instance execution should pass. 3. Though the *species facti*, in the Act of Parliament, be a disposition to a third party, the *ratio decidendi* was, that the wife could not contradict her oath, which, *in materia licita*, is *vinculum spirituale;* and, to restore her against, were *præbere occasionem perjurii*. 4. The provision in the contract imports only a personal obligement; and, not being conceived *irritanter*, it cannot have the effect of interdiction, even against the husband, far less against the son's wife, who is a singular successor. Again, the wife's renunciation was rational; in so far as, there being nothing to maintain five children during her life, she would have been obliged for an aliment to the heir, and also to have entertained the rest in her own family, *jure naturali;* and the public burdens being very great, the restriction to £300, free of all burden, was equal and rational. And the same being confirmed by an oath, she cannot be restored against it by any Christian judicatory, especially that provisions of conquest are not so strict obligements but that the husband has a liberty, notwithstanding, to do all rational deeds. And it was found, That a father might provide his unprovided children, of the first marriage, out of the conquest provided by the contract to the children of the second marriage. The Lords having considered the case, and the circumstances of it, they repelled the reasons of reduction, in respect of the answers; and assoilyied from the reduction.

Page 249, No. 881.

1685. *December.* JOHN BLAIR *against* BAILIE GRÆME.

JOHN Blair having raised a summons of *rei vindicatio* of a Polish bridle, worth £50 sterling, against Bailie Græme;—it was alleged for the defender, That *rei vindicatio* is only competent *contra possessorem*, which the defender is not. 2. The said bridle was lawfully pointed and apprised to the defender from Thomas Douglass, his debtor, in satisfaction of a part of the debt, and was thereafter, *bona fide*, disposed on as lawfully pointed, the defender having reason to think it belonged to Thomas Douglass, since possession of moveables pre-

sumes property. And the defender having discharged his debtor of the like sum for which the bridle was appreciate, he but *suum recepit*, which ought to defend against *rei vindicatio* as well as *condictio indebiti*. Answered for the pursuer, Though *directa rei vindicatio* be properly competent *contra possessorem*, yet the *actio utilis* is competent against any person who received benefit by the thing *in quantum lucratus*, and the defender must be liable for the price, as *surrogatum;* otherwise persons might come to be disappointed of their property by the extinction or loss of the subject: and the defender's oath of calumny is craved, if he had no reason to think that the bridle belonged not to Thomas Douglass. The Lords inclined to repel the defence; but, before answer, ordained some points of fact to be inquired into.

Page 258, No. 917.

1686. *January.* Sir James Stamfield *against* Mr Robert Blackwood.

John Macfarlane having granted bond to Mr David Watson, who assigned it to Mr John Mackenzie, who transferred it to Mr Robert Blackwood; and thereafter Sir James Stamfield having, after the assignation to Mr Mackenzie, and before his translation to Blackwood, arrested the money in the debtor's hands, as truly belonging to Sir Donald Macdonald, and only in trust in Mr Watson's person;—in the competition betwixt the arrester and Mr Blackwood, it was alleged for the former, That he offered to prove, by the oaths of Mr Macfarlane and Mr Mackenzie, That the bond was granted for the behoof of Sir Donald. Answered for Mr Robert Blackwood, That the cedent could not depone, nor the debtor be examined upon the trust against him, an assignee for an onerous cause. The Lords ordained both Mr Macfarlane and Mr Mackenzie, and also Mr Robert Blackwood, to be examined about the trust.

Page 22, No. 116.

1686. *January.* John Adam *against* James Ker and Robertson.

Found that a donator of *ultimus hæres*, being in the case of an heir, could not quarrel an assignation granted by the defunct, for want of intimation in his lifetime.

Page 35, No. 159.

1686. *January.* John Marshall, and Children of ——— *against* Mr John Richardson and the Heir.

A husband, in his contract of marriage, being obliged to secure the conquest during the marriage, to himself and his wife in conjunct fee and liferent, and to the bairns of the marriage equally in fee, took infeftment in the conquest to himself, and the heirs of the marriage, and granted bonds of provision to the younger

children; after his decease, the younger children pursued the eldest, to denude of their proportional part of the land conquest. Alleged for the defender, That, notwithstanding of the clause in the contract of marriage, providing the conquest to the bairns equally, the father, by his paternal power, might rationally proportion the same, with some inequality, according to their circumstances and deserving, that children may, by such a check, be kept *sub paterno obsequio*. Answered, The contract being betwixt small burgesses, whose succession is ordinarily made to run *in capita*, the provision therein must hinder the father to make an equal division; and, *in anno* 1678, between Stuart and Stuart, it was found, that a father's provision to the bairns of the marriage, without the word *equally*, did hinder him to make the younger children's provision less than that of the eldest; *multo magis*, in this case, was the father bound to an equal division. The Lords recommended to the parties to agree.

Page 46, No. 205.

1686. *January.* THE RELICT of PATRICK CUNNINGHAM *against* The LAIRD of EVELICK.

A HUSBAND was found liable to pay 200 merks, contained in a ticket granted by his wife, *stante matrimonio;* whereby she obliged herself, and her heirs, &c. to pay the same; to which ticket the husband did not consent, but only signed *witness:* because his signing witness was an approbation of the act, and a kind of *præpositura ad hoc negotium.*

Page 47, No. 206.

1686. *January.* ROBERT and JOHN GILLISES *against* JANET STUART.

A HUSBAND having, several years after his marriage, provided his wife (with whom he had made no contract,) to the liferent of a tenement of land, without any clause in satisfaction of terce and third; and, thereafter, having provided her to 3000 merks of his personal estate, and to a liferent of the rest, in satisfaction of the terce and third, and there happening to be no children of the marriage, the relict claimed the half of the personal estate. Alleged for the defender, That she could not have both a liferent of the tenement and the half of the personal estate; because, 1. The infeftment being before the late Act of Parliament, it imported an acceptation, in satisfaction of terce and third, without necessity of any express clause to that purpose; 2. The last settlement of the personal estate was a tacit revocation of the preceding infeftment of liferent given *stante matrimonio*. Answered, By our law and practique, settlement of jointure upon wives, without a clause *in acceptation*, &c. doth not cut off the right of terce,—as was found in the cases of the Lady Eleistoun and of the Lady Craighouse; 2. Provisions made, *stante matrimonio*, in favours of wives, with whom no contract was made before the marriage, are not revokable as donations *inter virum et uxorem*. The Lords sustained the reply, and found, That the wife had right to both the liferent of the tenement and to the half of the personal estate.

Page 98, No. 377.

1686. *January.* BALMADIES *against* HALGREEN.

FOUND that an executor-creditor could only compense upon such part of the debt as he had recovered sentence for in his own name, the testament not being *executum* till sentence is obtained.

Page 127, No. 468.

1686. *January.* MARJORY MASON *against* JOHN MASON.

IN the reduction of a discharge granted by a relict the day after her husband's death, when she was travailing of a child under the midwife's attendance, *ex capite luctus;* and also upon this ground, that she was not *compos mentis*, by reason of her pains and showers;—the Lords, before answer, allowed a mutual probation, and that by women witnesses, in respect of the pursuer's circumstances at the granting of the discharge.

Page 156, No. 563.

1686. *January.* BAILIE WEDDERBURN *against* BAILIE JOHNSTOUN.

JAMES Sutherland and Bailie Johnstoun being in copartnery with some others, Bailie Wedderburn raised a pursuit against Bailie Johnstoun upon a breviate of the books of copartnery, containing Charge and Discharge, all written with the defender's hand, the leger-books being lost. Alleged for the defender, That, as the abbreviate instructs the charge, so it must instruct the dscharge, especially considering, that, though the copartnery dissolved in the year 1663, the pursuer had not, till of late, pretended to any debt against the defender. Answered,—Bailie Johnstoun having been both book-holder and cash-keeper, and received 10s. per tun for his service, which, during the copartnery, amounted to upwards of £1000 sterling; and the copartnery having been carried on, by the granting of bonds and drawing of bills, for many thousand pounds sterling, upon the joint credit,—the discharge must be instructed by retired bonds, bills, and discharges thereof, otherwise the parties cannot be secured. The Lords found, that the articles of discharge relating to writ, must be instructed by the writ, where writ is usually taken, and required for persons' security.

Page 259, No. 918.

1686. *January.* THOMAS WATSON *against* JOHN DRUMMOND.

JOHN Drummond, factor, and Mr Jackson, of London, having, by way of a correspondence, drawn several bills upon one another, John Drummond fitted an account of debit and credit, specifying the particular bills, containing £500 of balance upon his own debit, which he subscribed, without any obligement to

pay, and sent it to Jackson: Jackson turning insolvent in a little time after, one Watson, his creditor, got the account, and pursued John Drummond for the balance. Alleged for the defender, That, since the account relates to bills as the ground of the debt, he could not be liable unless these bills were retired and satisfied; for they might have been protested for not-payment, and so come back upon the defender, as one or two have. Answered, Bills of exchange not being protested and returned *debito tempore*, the drawer is free; and, if the pursuer, who is a creditor to Jackson, and not master of the bills, were obliged to produce them, Drummond, by collusion with Jackson, getting him to keep up the bills though truly paid, could not be overtaken; which were absurd. And two of the bills being only protested, though all were drawn a good time since, the rest are presumed to have been satisfied; and the pursuer produces a bill, drawn by Drummond on Jackson, posterior to the fitted account, which is satisfied. Replied, Law prefixes no determined time for returning protested bills; and the intimating the protest was only necessary in case the defender had had effects in Jackson's hand, to be drawn out of it *debito tempore*; or to put the defender upon his guard, not to give Jackson new credit. 2. When Jackson, the bankrupt, collusively furnished the pursuer with the said account and bill, he would have furnished him with the other bills also, for clearing the balance, had they been retired and satisfied. The Lords found no process against the defender for so much of the balance as answered to the bills that were not returned to the defender, till such time as the said bills should be returned to him.

Page 259, No. 919.

1686. *January.* CRAIGHALL *against* ATHERNIE.

ATHERNIE having suspended a bond granted by him to Craighall, for his entry, upon this reason:—That his lands being a part of the abbacy of Northberwick, which was annexed to the crown in the year 1633, the king is superior, and nothing reserved to the lord of erection but the feu-duties, till redemption; so that the suspender hath mistaken Craighall for his superior; and here the king's advocate concurs with the suspender. Answered, By the Act of Parliament 1661, there is an exception of such vassals as had consented, or should consent, to rights of superiority of church-lands, as importing a resignation of the property in favours of the superior; and here the vassal, in the year 1634, made a formal resignation of the property in the king's hands, in favours of Craighall, then lord advocate, who was infeft thereon; which is much stronger than a bare consent mentioned in the Act of Parliament, and would have been a valid right, though there had been no such provision in the Act of Parliament for making consents equivalent to resignations; for, at all times, resignations were lawful, even before the Act of Parliament. The Lords found the letters orderly proceeded, and the sum payable to Craighall, as superior, for the entry.

Page 264, No. 940.

1686. *February.* DANIEL NICOLSON *against* PROVOST KINLOCH.

A DISPOSITION of lands, made by Provost Currie, being questioned upon the second part of the Act 1621, as a gratification, in prejudice of the pursuer's diligence by inhibition;—it was alleged for the defender, That the inhibition was null as to the lands disponed, not being executed at the right cross of regality; and a null inhibition is no diligence. Answered, The debtor being in effect bankrupt, any diligence, by the Act of Parliament, is sufficient to hinder gratification; nor was the inhibition null for want of any requisite solemnity; and, if the debtor had acquired any lands in the shire thereafter, the inhibition would have the effect of a formal diligence as to these, to hinder alienations by commerce, and so ought to obstruct gratification *quoad* others lying in the regality; yea, inhibition, even personally executed, and at the market-cross where the inhibited party dwells, will hinder the alienation of heritable sums; so that the pursuer's inhibition is a formal and habile diligence, as to some effects: The like holds as to the contracting of debt after inhibition, in so far as the inhibiter is thereby prejudged. The Lords assoilyied from the reduction; but the matter of fact was not fully understood, whether it was commerce or gratification. *Vide* No. 151, [Dalrymple against Lyell, 1687, November 25;] and, No. 296, [Dempster against Morison, 1683, November.]

Page 30, No. 142.

1686. *February.* SIR JAMES COCKBURN *against* PROVOST MILN and OTHERS.

FOUND that a denunciation to the horn at the market-cross of Edinburgh, where the party did not live, was not a sufficient diligence to hinder gratification, since his escheat did not fall thereby; and it was not a diligence *ordinata* to affect the goods, as other hornings are. *Vide* No. 140, [Cockburn against Miln, &c. February 1686.]

Page 30, No. 143.

1686. *February.* The LAIRD of LAMINGTOUN *against* JAMES OSWALD.

IN the improbation of a tack, at the instance of Lamingtoun against James Oswald, the defender produced a registrate extract in the year 1632, and contended, That, after so long a time, he could not be obliged to produce the principal,—especially the pursuer and his authors having homologated the same by their constant payment of the tack-duty. Answered, The tack is not quarrelled as to the verity of it, or the quantity of the tack-duty; but as to the endurance, in respect the extract contains more years than the principal. The Lords stopped certification till the registers might be searched; and inclined to sustain the tenor proven, in case it were not found.

Page 157, No. 565.

1686. *February.* ARTHUR FORBES *against* GORDON of PARK.

IT being objected against the execution of a summons of reduction, That it was null by the Act 32, Parl. 5, James III; Act 74, Parl. 6, James V;—for that, though it was recent, it did not appear to be stamped;—Answered, Sealing and stamping was then required, when few messengers could write their names, and when the stamp contained the initial letters in place of their subscription; but now it is unnecessary, when all messengers do write: And by the Act 139, Parl. 12, James VI, executions are appointed to be subscribed by the executor: And sealing, in several other things, is now in desuetude, Act 117, Parl. 7, James V; Act 29, Parl. 6, Queen Mary; Act 80, Parl. 6, James VI: And the executions of summons seldom bear any vestige of stamping; and many of them do not bear that they are stamped. Replied, Solemnities required by law, in executions, cannot be dispensed with, though some of them seem unnecessary and useless; and all executions of summons ought to be stamped. And the Act 139, Parl. 12, James VI, seems to add subscribing to sealing of executions. The Lords inclined to find the execution null; but did not pronounce their interlocutor. *Page* 260, No. 920.

1685, *November; and* 1686, *March.* The LAIRD of ARNISTON *against* LORD BALLENDEN.

THE Lord Preston having disponed his lands to his eldest son, with the burden of all his debts, in the same manner as if the son were served heir to him, which quality is repeated in the procuratory; the son, a little while after his father's decease, granted a disposition to the Lord Arniston, in satisfaction of some cautionaries paid for his father, and for payment of some others of his father's creditors, mentioned in a subscribed list. The father's other creditors raised reduction of this last disposition, upon the late Act of Parliament, as in prejudice of them, within year and day of the common debtor's decease. 2. That the quality in the son's disposition was real *quoad* all his father's creditors, so as he could not prefer any. 3. *Esto* the son was infeft upon his disposition before the father's death, yet he ought to be reputed as an apparent, *quoad* the effect of the late Act of Parliament, to hinder disponing within the year, and granting preference to the father's creditors for three years; otherwise the Act would be eluded by persons on deathbed being prevailed with to give infeftments to their sons, in prejudice of their own creditors; and this extension is as rational as the extending of the Act anent apparent heirs acquiring rights of apprising against their predecessor's estate, after their death, to apprisings acquired during the predecessor's life. Answered, The Act prohibiting dispositions, within year and day of the predecessor's decease, in prejudice of their creditors, is not designed to make a party amongst them, but only to prefer them to the creditors of the heir. 2. The provision burdening the disposition with the debts due to the disponer's creditors is not real. 3. The Act is expressly in the case of apparent heirs disponing; and the son being in the fee, cannot be served heir to his predecessor, who was deceased before his death; and, as the father might have preferred such creditors as he pleased, there being no di-

ligence used against him, the son might do the like in the father's life, or immediately after his decease, the power of disponing being the effect of dominion. Replied, The Act is clearly conceived in favours of the defunct's whole creditors, as appears from the motives therein expressed, *viz.* That it takes some time before his death can come to their knowledge; and 'tis but just that, as the apparent heir is secure for year and day against all diligence at the instance of the defunct's creditors, so it should not be in his power to prejudge them during that space, by preferring some to others. The Lords found, that the son being infeft during the father's life, his case fell not under the Act of Parliament: and that the provision, though in the procuratory, was but personal; and assoilyied from the reduction: but waved to give answer to the first reason, *viz.* if any of the father's creditors could be gratified.—*November* 1685.

Page 28, No. 137.

The debate, (*supra,*) No. 137, being again resumed, it was alleged, That the Act of Parliament ought to be extended to dispositions made by the son, who had come to the estate *per præceptionem;* otherwise it might be eluded. 2. The father burdens the right to the son with all debts he should contract, even *in articulo mortis;* and the son is declared liable, as if he entered heir, and so cannot, more than an heir, dispone within the year. Answered, The Act is *stricti juris;* and there can be no pretence of collusion in this case, where the son's disposition was fourteen or fifteen years before the father's death, and his infeftment expede under the great seal. 2. The clause burdening the son, as if he was heir, is only intended to secure the creditor's debt, without any respect to the Act of Parliament. The Lords, having re-considered the debate, were divided in their opinions; but my Lord Ballenden, having consented to Arniston's preference, as to his proper debts, the first interlocutor stood as to him: but the Lords reduced *quoad* the other creditors, whom Arniston had, some time after his disposition, assumed.—*March* 1686. Which seems somewhat inconsequential. *Vide* No. 773, [Lord Ballenden against William Murray, March 1685.]

Nota. The defunct's creditors, doing diligence within the three years, are preferable, even where the heir dispones after the year; otherwise the heir's creditors would have more advantage by a voluntary disposition, than they could have by a legal diligence, which were absurd. But a disposition within the year would be postponed to the defunct's creditors, though they do no diligence within the three years; such dispositions being prohibited, in so far as they prejudge the defunct's creditors, where no diligence or time is limited or required. —*Castlehill's Pratt.* tit. *Alienation,* No. 81.

Page 31, No. 144.

1686. *March.* OLIPHANT *against* SIR JAMES COCKBURN.

A REDUCTION, upon the Act 1621, of a disposition, by Mr Laurence Oliphant, advocate, of his whole estate to his near relations, and conjunct persons, for relieving them of cautionary, being raised, as done to conjunct persons, when he was *in lecto,* where creditors could have no execution against him, and he being curator to the pursuers, having the grounds of their debt in his own hands;—Answered, There was no diligence against Mr Laurence, nor was his condition suspected by any, and the pursuer's debt was not preferable or privileged as a pu-

pil's debt; nor was it payable till after Mr Laurence's death. The Lords first assoilyied from the reduction; but, upon a new hearing, they reduced the disposition, upon the specialty of the pursuer's having been pupil to Mr Laurence, who died *ante redditas rationes.* *Page* 31, No. 145.

1686. *March.* MARY COCHRAN, MR WALTER COCHRAN, and ANDREW THOMSON.

ONE having granted an assignation, to his niece, of a bond, without delivering thereof; and she having pursued an exhibition against the cedent's heir,—it was alleged for the defender, That the bond and assignation were never delivered, but remained in the cedent's hands at his death, and bore no clause dispensing with the not-delivery. Answered, That the assignation contains a reservation of the granter's liferent, with a power to alter, which was a rational interest for retaining possession of the writs; 2. The assignation and bond were delivered, in so far as the cedent, before his death, delivered to the assignee the key of his cabinet, where the papers lay. Replied, That a dispensing clause hath the effect of delivery; but such a reservation hath not; 2. The cabinet key was delivered only *custodiæ causa*, as the keys of the cedent's house were. The Lords found, That the niece had right to the bond, and preferred her to the heir. *Page* 47, No. 208.

1686. *March.* MRS RUTHVEN *against* LORD REIDFOORD and HUGH WALLACE.

HUGH Wallace, cash-keeper, who had right to several apprisings upon the lands of Corstorphin, having, by a contract with my Lord Reidfoord, a creditor, preferred his Lordship, and communicated to him these rights; and thereafter consented to an annualrent of £100 sterling, to Mr Ruthven's Lady; in a competition with her and my Lord, it was alleged for the latter, That apprisings may be qualified and restricted by personal obligements and rights. Answered for Mrs Ruthven, That no personal obligement could qualify Mr Wallace's apprising, in prejudice of Mrs Ruthven, as a singular successor, whose right is real by infeftment. The Lords preferred Mrs Ruthven. *Vide* No. 310, [Sinclair of Southstone against Sinclair of Stanestone, January 1685.]

Page 77, No. 318.

1686. *March.* SKIRLING *against* MR CRICHTON.

A CREDITOR having granted a discharge to two of four cautioners, for love and favour; and declared therein, that the whole debt should stand, and be payable by the other two cautioners,—the Lords inclined to think, that the discharge imported a discharge of the half, seeing it was not conceived by way of *pactum de non petendo.*—The like was found as to a co-tutor.

Page 113, No. 422.

1686. *March.* JOHN JOLLY *against* The LAIRD of LAMINGTOUN.

FOUND that a summons of reduction on minority, not executed within year and day after raising, is null.

Page 260, No. 921.

1686. *March.* BELSHES of TOFTS *against* The TENANTS of LOUDOUN.

IN a process of mails and duties,—it being alleged, That the executions of the summons were null, for not bearing the particular diets when the defenders were severally cited, whereby the mean of improving the same was cut off; 2. The principal apprising is not produced as the title of the process, but only a transumpt thereof;—Answered for the pursuer, When many defenders are cited, especially tenants, 'tis usual for the execution to bear upon the 1st, 2d, 3d, 4th days, &c. without distinguishing which of the defenders were cited upon the 1st day, &c. and this always sustained, unless improbation be proponed *peremptorie* against the execution; and then the pursuer may condescend upon the particular day; 2. Transumpt is a [formal] sentence before the Lords of Session, and therefore a sufficient title to pursue. The Lords sustained process, and repelled both defences.

Page 260, No. 922.

1686. *March.* LORD CALLENDER *against* The DUKE of HAMILTON.

IT being objected against the executions of a summons, that the day of citation was a Sabbath-day, and so unlawful;—Answered, That was but an error in the naming of the day of the month. The Lords sustained the execution, and allowed the day of citation to be helped.

Page 260, No. 923.

1686. *March* 25. MILTOUN *against* SIR DANIEL CARMICHAEL.

IN the improbation at the instance of young Miltoun, against Sir Daniel Carmichael, of a seisin to Sir John Whitfoord, the pursuer's father, the articles of improbation were, That three of the witnesses insert deponed, that they did not remember that ever they were witnesses to such a deed, but could not be positive, it being thirty years ago; and the alleged bailie to the seisin deponed, that he could not say positively that ever he gave such a seisin; 2. The seisin was not booked in the register, but only marked by the depute. And, albeit the dead witnesses might prove presumptively *per se*, they cannot make faith against a contrary positive probation by four concurring living witnesses; for, if living witnesses were not sustained to convel the presumption arising from such as are

dead, it were easy to secure all forgeries, by putting in dead witnesses. The articles of approbation were,—1. Some of the witnesses in the seisin being dead, these are probative of the instrument; 2. Sir John was generally looked upon as a person infeft, and borrowed money, near to the value of his lands, from Sir Daniel Carmichael, a neighbour heritor, to whom he, Sir John, delivered his seisin now quarrelled; 3. When Sir John borrowed money from my Lord, his seisin was got up from Sir Daniel, to be shown to his Lordship, who got a wadset from Sir John, designed therein *heritable proprietary;* 4. Sir John, as a baron, stood and voted for commissioners to the Parliament, was a commissioner of assessment, and frequented all the meetings of the heritors; 5. In a petition to the Exchequer, signed by him, narrating there were precepts out of the Chancery upon his retour to infeft, and that the sheriff was chargeable with the non-entry by the responde, he craved, that, in respect of his services to and sufferings for the king, he might have the ease of his non-entry, and the sheriff discharged thereof; which desire was granted, after the term subsequent to the precepts, when they were null by the clause *præsentibus post proximum terminum non valituris.* Now, this petition imports, that he was liable and the sheriff liable, and consequently that he, Sir John, was infeft; 6. His special retour to these lands is produced; 7. The seisin is marked by the register-depute, who acknowledges the marking; and Archibald Hasty, sheriff-clerk, who is dead, was notary thereto, a man of entire reputation. The Lords, having considered the articles of improbation and approbation, they sustained the verity of the seisin, and assoilyied from the improbation. *Vide* No. 603, [Sir Daniel Carmichael against John Whitfoord of Miltoun, December, 1685.]

Page 157, No. 567.

1686. *December.* The Creditors of Lauderdale *against* Lord Yester.

The Creditors of the Duke of Lauderdale, having craved a decreet, *cognitionis causa,* upon the heir of tailyie's renunciation, my Lord Yester compeared, and alleged, That he had interest to show that the pursuer's debts were satisfied, both as being apparent heir of line, against whom the creditors might recur, and as the first adjudger; and therefore he craved to see the process. Answered for the pursuers, That the year and day of my Lord Yester's adjudication was so far run, that a week's delay would totally exclude them from coming *in pari passu* with him; and they were content to reserve all defences competent to the heir of line *contra executionem.* The Lords ordained a decreet *cognitionis causa* to be put up in the minute-book, not to be extracted, that the summons of adjudication might be raised and executed; and allowed my Lord Yester to insist in proving the debts satisfied, any time betwixt and the pronouncing of the decreet of adjudication; and the decreet *cognitionis causa* to be restricted and regulated according as the debts should appear to have been satisfied.

Nota. Here the summons was raised at the instance of many creditors, every one for their own debts; which was a novelty, the ordinary custom being to assign all the debts to one upon back-bonds.

Page 3, No. 10.

1686. *December.* LORD BANFF *against* His LADY.

A PROCESS of adherence before the commissaries, pursued by my Lord Banff against his Lady, was advocated by the Lords, and the Lady assoilyied, without remitting to the commissaries, with directions,—in respect the Privy Council, in a process of aliment, at her instance, had found, that there was cause for a distinct aliment, which imported a cause for separation.

Page 5, No. 16.

1686. *December.* DUNDAS of BALLENDARY *against* MR GEORGE WILSON of PLEUGHLANDS.

MR George Wilson, who was to pay 4000 merks to Dundas, having assigned him to Fordel Henderson's bond for the like sum, with absolute warrandice qualified thus, That in case the assignee using due and exact diligence, by registrating the bond, raising horning, poinding, and arrestment, and discussing any suspension of the charge, should not recover payment, then the cedent was to be liable after retrocession of the right and diligence: The assignee, having suffered Fordel to live thirteen months after, without doing any diligence against him, recurred, after his death, by a pursuit, against the cedent. Alleged for the defender, That the pursuer had neglected to use the diligence above-mentioned, by which he might have recovered payment; and now Fordel's affairs are turned in such confusion as the defender will find it difficult to recover the money. Answered for the pursuer, The pursuer is under no positive obligement, by the clause, to do diligence; for it imports only a delay of recourse till the diligence be done, which is now imprestable, when Fordel is dead; and yet the pursuer hath done the equivalent, by adjudging against the heir as soon as any other creditor: Nor had the pursuer any reason to charge and distress Fordel incivilly; who was represented and reputed solvent, and been trusted by the defender with the money, for fifteen years before assignation, without using any diligence; 2. There is no time appointed for the doing of diligence in. Replied, No time is the present time. The Lords decerned against the cedent. *Vide* No. 124, [Sir James Dick against William Dick of Grange, February 1688.]

Page 23, No. 117.

1686. *December.* LORD BARGENNY *against* LIN of LARG.

IN a declarator of expiring of the legal of an apprising, at the instance of the Lord Bargenny,—the Lords found, That the pursuer's receiving, since the legal expired, annualrents for terms after expiring, and obliging himself to hold count therefore, in the apprising, did import a prorogation of the legal, till declarator; and the apprising was now purgeable by payment of the superplus, for which the Lords allowed till Candlemas next.

Page 79, No. 322.

1686. *December.* THOMAS WADDEL *against* GORDON of CRAIGHLAY.

IN a pursuit, at the instance of posterior apprisers, within year and day, against the first, for a share of the rents and profits *pro rata*;—it was alleged for the defender, That, seeing they did not concur before now, and claim their share, he had right to uplift the whole for his own use; by which means he would be soon paid off; 2. The pursuers ought to pay the whole expense of the first appriser's diligence. The Lords repelled the first allegeance; and found, That the whole expenses should be first deduced off the defender's intromissions with the rents, and the remainder divided *pro rata*; and it appears reasonable that, if the first appriser or adjudger take his expenses this way, he cannot claim also the benefit of sheriff-fees and penalties in apprisings, or of the additional fifth part in adjudications; since that were double payment; and the posterior apprisers are not to be losers, but only advancers of the expenses.

Page 79, No. 323.

1686. *December.* The LAIRD of LAMINGTOUN *against* LADY BLACKBARONY.

THE Laird of Lamingtoun, craving certification in an improbation, at his instance, against some vassals;—it was alleged for the defenders, That they and their authors had been in immemorial possession of the lands, reputed as feuars, and the immediate author was an appriser; and 'tis usual for debtors to keep up their writs from apprisers. Answered for the pursuer, That the defenders do not produce any document to instruct that the debtor was vassal, nor any discharge of feu-duty, or entry of heirs or successors; so that the tenor cannot be proven. The Lords delayed extracting for a year, and examined all persons suspect of having writs, or having knowledge thereof. *Page* 158, No. 568.

1686. *December.* ROBERT CHAPMAN *against* UMPHRA COLQUHOUN.

IN a competition of infeftments, it being alleged, That the prior in date was not valid, in respect the sasine proceeded upon a precept of *clare constat*, granted by Bishop Leighton as superior, and was taken after he was removed from his bishopric, when he was civilly dead; and, *mortuo mandatore, expirat mandatum*;—Answered, 1. The bishop's precept is sufficient till his death; and the deposing or translating doth no more prejudge it than if he had sold the superiority after granting of the precept; 2. The succeeding bishop ratified and confirmed the precept and infeftment. The Lords sustained the answer, and preferred the prior infeftment. *Page* 168, No. 605.

1687. *January.* DAVID MELVIN *against* ROBERT CARSTAIRS.

AN adjudication being quarrelled as null upon these grounds:—1. It could

neither be sustained as a general nor as a special adjudication; not as a general, because it adjudges for a fifth part more, and for the composition to the superior, and expenses of infeftment, as the Act provides in the case of special adjudications; nor as a special one, since it proceeds not upon a special rental and probation. 2. The term of payment, of the sum adjudged for, is the next term after a liferenter's decease, which was not declared. Answered, The adjudication was led in the year 1679, when the Act was not fully understood; and, therefore, some escapes in form should be dispensed with. 2. The term of the liferenter's decease being libelled, and not denied by the debtor, who compeared in the process of adjudication, it needed not be proven. The Lords sustained the adjudication.

Nota. The Act of Parliament appoints the fifth part in special adjudications, to be the fifth not only of the principal, but effeiring to the principal and annualrents resting the time of adjudication, and stocked. 2. The clause of redemption provides nothing in relation to the fifth part of penalty, or expenses of adjudication, which yet in justice is due. But, in total adjudications, we adjudge ordinarily for principal, annualrents and penalty, all stocked the time of adjudication into a liquid sum; and also for the superior's composition, and the expenses of passing infeftment in general without liquidations, (which, by the Act, bears annualrent from the time of expending,) and total adjudications are declared, by the Act 1661, redeemable in all points as comprisings: and though there be no sheriff-fee due, yet, seeing, in 1661 the appriser had the penalty free, so now adjudgers ought to have expense of the decreet of adjudication and recording, &c. so as the penalty may be free. *Page* 3, No. 11.

1687. *January.* AUCHINMOULY *against* DOROTHY BUCHANNAN.

AN assignation being quarrelled as null, because consisting of two sheets of paper, and the margin, at the joining, not subscribed by the cedent;—Answered, The cedent being a wife, had judicially ratified the same in presence of the mayor of Waterfoord, in Ireland, attested by his subscribing indorsed on the first sheet. Replied, The cedent does not subscribe the judicial ratification. The Lords sustained the ratification; but it appeared that the debtor and the cedent had settled. *Page* 23, No. 118.

1687. *January.* MARGARET BROWN *against* ANDREW BURNET, MERCHANT in ABERDEEN.

IT was debated, if a substitution to one, in case she die unmarried, did convalesce upon her dying within year and day after her marriage.
Page 48, No. 213.

1687. *January.* CLIFTONHALL and His WIFE *against* DAVID OSWALL.

A PERSON named executor and universal legatar by his father, having filled

up, in his own name, a blank moveable bond he found lying by the defunct and omitted out of the testament confirmed by him; the defunct's daughter did afterwards confirm the said bond, as executor *ad omissa:* The son's assignee pursued the debtor for payment. Alleged for the debtor, That the sum contained in the blank bond was *in bonis defuncti*; and, 2. Alleged for the sister, executor *ad omissa,* That the cedent had lost his interest in the sum, by *dolosè* omitting the same out of the principal confirmed testament. Answered for the pursuer: 1. 'Tis denied that the bond was blank in the defunct's custody; 2. The son, as executor and universal legatar, had right thereto; 3. Though omissions in executors, who have a naked office, are punished by the custom of the commissaries, yet such omissions, in persons who have a positive interest of universal legacy, or legitime, &c. are not presumed fraudulent, but to happen through negligence. The Lords ordained trial to be taken if the bond was found lying blank by the defunct; but found, that the son, the cedent, and his assignee, would, by reason of the universal legacy, have right to the sum, though not confirmed. *Page* 129, No. 472, [1st.]

1687. *January.* Mr Alexander Colvil *against* William Haly.

In the reduction and improbation, at the instance of Mr Alexander Colvil against William Haly, of writs granted to the defender by Jean Colvil;—Alleged for the defender, That Jean Colvil being author condescended on, the pursuer ought to have cited her, or her nearest of kin, if she be dead; 2. He could not produce writs granted by Jean; because the pursuer libelled or instructed no right, in his favours, flowing from her by disposition or succession; 3. The defender is only obliged to condescend on the dates of decreets before the Lords, and not produce them, or the grounds and warrants; and extracts of registrate writs must satisfy the production, and the pursuer must seek the registers for the principals. The Lords, *ex gratia,* allowed Jean Colvil, or her nearest of kin, to be cited *cum processu,* in respect the defender was an agent, who had been vexatious to the pursuer; and they sustained [the second] and third defences as relevant. *Page* 158, No. 569.

1687. *January.* Forrest *against* John Callender.

Mr Alexander Higgins having disponed his lands of Craigforth to John Callender, whereupon resignation was made in exchequer, after one Forrest had been infeft base in an annualrent out of these lands; Forrest raised a poinding of the ground, and, before decreet thereon, John Callender presented a signature to the exchequer, and infeftment followed after the decreet of poinding, which was obtained immediately after the first term of payment of annualrent. In a competition betwixt Callender and Forrest,—alleged for Callender, That he having presented a signature before the other's decreet, the infeftment ought to be drawn back to operate from the date of presenting the signature, seeing he could do no diligence by a charge against the king; and applications to the exchequer (which is a public judicatory,) could not be disappointed, more than a prior action before the Lords by a posterior first consummated before an in-

ferior judge. Answered, Whatever might be pretended as to the presenting signatures upon legal diligences, yet any superior may not only delay, but refuse voluntary rights; 2. By constant practice, the first infeftment upon the last signature is preferable; 3. A right may be rendered public, either by confirmation or possession, or decreet of declarator, or poinding of the ground, according to the nature of the right; and Forrest not only raised his summons, (which had been sufficient,) but recovered decreet before Callender's infeftment. The Lords preferred Forrest, as having the first public right. And, in a competition here, between two processes of poinding the ground, the Lords preferred the first citation. *Vide* No. 608, [John Callender against Creditors of Craigforth, February 1687.] *Page* 169, No. 606.

1687. *January.* SOWTON *against* SMEATON, &c.

FOUND, that where a creditor's money is affected by arrestments, he may raise a multiplepoinding in the debtor's name, and the debtor cannot disclaim it.

Page 213, No. 754.

1687. *January.* ASHURT *against* CLIFTONHALL.

THE Lords sustained a holograph rental unsubscribed, as the constitution of the rental against his heirs.

Page 225, No. 802.

1687. *January.* HERMISHEILS *against* The LAIRD of DALZIEL.

FOUND that a writ, whereof the margin was only signed by the principal debtor, and not by the cautioner, could not be quarrelled, as defective upon that head, by the cautioner. And though the margin have no witnesses, yet the subscription thereof may be proven by the pursuer's oath, even in an improbation. *Vide* No. 575, [Andrew Johnstoun against Johnstoun of Lockerbie, February 1688.] *Page* 253, No. 895.

1687. *January.* ACHMOWLY *against* DOROTHY BUCHANAN.

AN assignation by a wife clothed with a husband, consisting of two sheets, not side-signed by the cedent, was sustained in respect of her judicial ratification in Ireland before the mayor, written upon the first sheet, though the said ratification was only signed by the mayor, and not the party. *Vide* No. 118, [Auchinmouly against Dorothy Buchannan, January 1687.]

Page 253, No. 896.

1687. *February.* JOHN CHANCELLOUR *against* MAJOR BAITMAN.

PROVOST Drummond having disponed his goods to Bailie Hamilton, after he had been charged with horning by Major Baitman; John Chancellour and others arrested, afterwards, the goods in the common debtor's shop, and in Hamilton's hands; and thereafter Baitman arrested also. Chancellour claimed preference, as being the first arrester. Alleged for Baitman, That the disposition was preferable to the arrestment used by Chancellour; which disposition, though reduced upon the act 1621, as *in fraudem* of Baitman's anterior charge, excludes all posterior diligences. Answered, That Baitman could found on the disposition, which is not in favours, and Bailie Hamilton does not oppose John Chancellour; so that his diligence of arrestment must be considered as if the disposition were passed from. The Lords preferred Baitman, unless Chancellour had grounds sufficient to reduce the said disposition.—*February* 1687. Thereafter this interlocutor was stopped. *Vide* No. 153, [Laurence Gellaty against Stuart, 3d February 1688;] and No. 439, [James Room against Robert Cleland, December 1687.]

Page 17, No. 91.

1687. *February.* ALEXANDER TURPIE *against* JAMES ARCHIBALD.

FOUND that a sum assigned in trust fell not under the cedent's *bona* at his decease, the assignation being intimated in his lifetime.

Page 24, No. 121.

1687. *February.* JOHN OGILVY *against* BROWN.

AN assignation, not intimated, sustained as a sufficient title to pursue reduction, *ex capite inhibitionis*, raised on the bond assigned, without necessity of a licence; but that the assignee should confirm before extracting.

Page 24, No. 120.

1687. *February.* LAW *against* ROBERT CURRIE.

DEBATED, If a debtor's being witness in an assignation to the debt be not an intimation *quoad* him, so as to hinder the subject assigned to fall *in bonis* of the cedent; but heritable bonds need no confirmation, though not intimated.

Page 24, No. 123.

1687. *February.* DAVID OSWALD *against* SOMERVEL and BOYD.

FOUND that a disposition, with warrandice, by a husband to his wife, *inter*

vivos, of all free goods he should have, the time of his decease, implied the burden of his debts; and that the clause, *the time of his decease*, did not make it *donatio mortis causa*.

Page 31, No. 146.

1687. *February*. The LAIRD of DUNDAS and CRAMOND *against* GEORGE DUNDAS.

THE Lords ordained a wadsetter to assign his wadset to a purchaser of the land and reversion, seeing he could condescend on a prejudice he was to sustain thereby.

Page 59, No. 249.

1687. *February*. CHARLES CHARTERS *against* ANDREW BARRY.

FOUND that a third appriser, within year and day of the second, and not of the first effectual apprising, could not come *in pari passu* with them.

Page 79, No. 324.

1687. *February*. GEORGE GELLAN *against* DAVID CORSAR.

A MAN having assigned to his father, by way of aliment, the sum in a bond formerly taken by him to his wife, in liferent, *stante matrimonio*, with whom he had made no contract;—in a competition, after his decease, betwixt his relict and father, it was alleged for the relict, That provisions, *stante matrimonio*, to wives having no contract, are not revokable as donations, marriage being an onerous cause. Answered, The husband is fiar in the bond, and might alter; 2. The bond doth not relate to the marriage, and wives have the legal provision of third and terce; and here the husband hath settled on his wife a large provision above what could have fallen to her by law; and, *in quantum* the liferent of the bond exceeds the legal provision, it is *donatio*. The Lords preferred the father during his life.

Page 99, No. 385.

1687. *February*. MURRAYS *against* MILLER.

A PERSON having poinded upon a decreet obtained before a baron court, the defender pursued a spuilyie before the sheriff of Lanark, who found the decreet of the baron court null, and decerned in the spuilyie; which decreet of spuilyie being suspended, the Lords found the sheriff, who is an inferior judge, could not

cognosce the decreet of another court; and therefore turned the decreet of spuilyie into a libel.

Page 110, No. 410.

1687. *February.* The PROCURATOR-FISCAL of PEEBLES *against* FAIRINGTON.

A WIFE's discharge, *in lecto*, of all right she had in her husband's goods, does not hinder confirmation at her death, more than assignation *in lecto* doth hinder confirmation of the subject assigned. And it was debated, That, though a wife hath no creditors to confirm it, or her nearest of kin neglect to do it, the procurator-fiscal may confirm for securing her part of the goods; 2. That the wife's disposition of her share of the goods in communion to her husband, in *liege poustie*, stops confirmation; and she hath not *retentam possessionem* to infer simulation, as when a husband assigns to his wife. *Vide* No. 474, [Procurator-Fiscal of Peebles *against* George Rutherford of Fairington, February, 1688.]

Page 129, No. 473.

1687. *February.* DUNCAN CAMPBELL *against* STROWAN ROBERTSON.

A RIGHT found conveyed by an intimated assignation, and not to be *in bonis* of the deceased cedent, but in the person of the assignee, as formal creditor, though it appeared, by the assignee's oath, that the assignation was granted for the cedent's behoof.

Page 129, No. 472.

1687. *February.* JOHN CALLENDER *against* CREDITORS of CRAIGFORTH.

FOUND that a base infeftment was clothed with possession only by a summons of poinding the ground, raised and called *declaratorie ante terminum*, or by a decreet obtained, after the infeftment, for a term's annualrent prior to the infeftment. *Vide* No. 606, [Forrest against John Callender, January, 1687.]

Page 170, No. 608.

1687. *February.* ROBERT CRAWFURD *against* The MAGISTRATES of AYR.

THE magistrates of Ayr having, by an act of council, commissioned an agent to manage their affairs, he pursued the succeeding magistrates for payment of his accounts. Alleged for the defenders, That the pursuer's accounts ought not to be sustained, being for managing a factious process at the employer's in-

stance against the inhabitants, wherein they did not prevail. The Lords found the defenders liable to the agent, and that they might seek their relief as accords of the law.

Page 193, No. 680.

1687. *February.* ENTERKIN *against* SCOT of BONNINGTOUN.

IN a process against Scot of Bonningtoun, at the instance of Enterkin, who, as sheriff-depute, had given infeftment to the defender, conform to a precept of the Chancery upon letters of relief, for the entry and non-entry duties;—Alleged for the defender, These duties are presumed to have been paid, seeing the precept bears a clause *capiendo securitatem*, &c. and no security is produced. Answered for the pursuer, They are presumed to be full resting, unless a discharge be produced; and, *de facto*, the pursuer took the security for them, because he knew they were *debitum fundi*, which is securer than a bond. The Lords inclined to sustain the defence, unless it were convelled by the defender's oath.

Page 209, No. 735.

1687. *February.* DUCHESS of LAUDERDALE *against* ALEXANDER STEILL.

THE Duchess of Lauderdale having pursued Alexander Steill to remove from the coal-grieve's house,—it was alleged for the defender, That he ought to [be found entitled to] so much, *exceptione doli*, as a barn or stable built by him were, or might be worth to the pursuer. Answered for the pursuer, The stable and barn *inædificata solo alieno cedunt solo;* especially the defender not being tacksman, but a grieve and servant, who might have been turned off at any time, as he now is, upon malversation. Replied, The coal-works required horses to draw the water, and consequently a stable to lodge them in, and a barn to thresh corns for them. Duplied, The defender furnished horses to the coal-works for his own gain, which the tenants of Diddistoun had been in use to do at 10d. *per diem*. And the pursuer is willing that the defender take down his stable and barn, as being of no use to her. The Lords appointed a visitation for trying what the building might be worth to the pursuer, and resolved to modify accordingly.

Page 241, No. 844.

1687. *February.* POLLOCK MAXWELL, &c. *against* GRAY of CRICHIE.

A SUMMONS of adjudication being raised, at the instance of Hugh Wallace, cash-keeper, against several persons fined by the council, and the execution apart bearing *Hugh Wallace*, the pursuer, and relating to the summons;—it was alleged for the defenders, That, by the late act of Parliament, all summonses not designing the pursuer and defender, are null. Answered for the pursuer, The

pursuit is for the King's behoof, whom the negligence of his officers cannot prejudge. Replied, The King is denuded in favours of donatars. The Lords sustained the defence on the Act of Parliament; but allowed the pursuers to help the execution, or produce a new one. *Vide* No. 927, [Crichy Gray against Pollock Maxwell, July, 1687.]

Page 260, No. 924.

1687. *February.* SIR WILLIAM BINNING *against* The LADY CARSE HOPE.

THE Lords sustained a notorial copy of Colonel Gordon's testament, as the title of process, the pursuer proving, *cum processu*, that notorial copies made faith where notaries were not present at the subscribing, as notorial extracts did where the notary was present and did subscribe the instrument with the party.

Page 261, No. 926.

1687. *February.* HALIDAY and HOWISON *against* WINDERAM and JOHNSTON.

A TUTOR having wadset a piece of land, for security of a creditor of the pupil's, and another creditor having arrested the rents of the said land;—it was alleged for the arrester, That his arrestment ought to take effect, notwithstanding of the wadset; because a tutor could not wadset more than he could sell the lands, without the authority of a judge. Answered, Tutors may wadset; 2. The pupil does not quarrel the wadset; and it is *jus tertii* to the arrester to quarrel the same; and, 3, The wadset is equivalent to an assignation to mails and duties. The Lords preferred the wadsetter.

Page 280, No. 991.

1687. *February* 2. MASTER of MONTROSE *against* LADY GRIZEL.

MY Lord Montrose having given a bond to his sister, with this provision, That she should marry with consent of his Lordship and his friends; and my Lord having died, leaving a child who was not capable to give consent,—the Lords found the creditor's marrying the Lord Cochran's brother, without her friends' consent, was no irritancy.

Page 48, No. 211.

1687. *February* 2. DANIEL NICOLSON *against* PROVOST KINLOCH.

INFEFTMENT of relief to a cautioner accresceth to the creditor of the debt for which it was granted, so as the cautioner infeft cannot, in prejudice of him

and the co-cautioners, apply the infeftment for security of other debts due to himself.—*2d February* 1687, *Daniel Nicolson* against *Provost Kinloch*:—Also, *eodem die*, *Marshall* against *M'Kell*, and *Creditors of Clackmannan* against *Newton*; *Bruce's Creditors*, and *Langton's case*.

Page 59, No. 245.

1687. *February* 2. HENRY MEIN *against* JOHN RUTHERFOORD.

CAUTION as law will, found to import caution *judicio sisti et judicatum solvi*.

Page 59, No. 246.

1687. *June*. MAXWELL of BEARCROFT *against* JOHN LAWSON.

FOUND that an apprising for debt contained in a bond may be redeemed, as satisfied by intromission, or other debt, as well before the apprising as during the legal; but it was not pleaded that the apprising was null, as when a part of sums apprised for are satisfied to the appriser before leading; seeing the same was not applied actually in a compensation.

Page 80, No. 326.

1687. *June*. WISHAW *against* ANDREW LUNDY.

IN a competition between the creditors of Sir John Brown, and Andrew Lundy, cautioner for him to John Oliphant, who, upon distress, paid the debt, and took a discharge to the debtor, his heirs and co-cautioners,—and to whom Oliphant assigned an apprising of the debtor's lands, led in his, Oliphant's name, after granting of the discharge;—it was alleged by the other creditors, That Andrew Lundy is presumed to have made payment of the debt discharged with the debtor's own means, he having been tutor to Sir John Brown's daughter, and intromitter with her estate; and therefore the apprising, following upon a paid debt, is null. Answered, The discharge narrates Lundy to be a distressed cautioner, and bears to be granted for his relief, as to which it was equivalent to an assignation; so as Oliphant might, even after the discharge, lead the apprising for Lundy's behoof. The Lords found the answer relevant, and sustained the apprising, even for accumulations. *Vide* No. 298, [Wishaw against Andrew Lundy, January 1684;] and No. 308, [Wishaw against the Children of Andrew Lundy, March 1684.]

Page 80, No. 327.

1687. *June.* Mr Patrick Shiels *against* Thomas Ogilvy of Logy.

The Marquis of Douglas's gift of the liferent escheat of Logy Ogilvy, his vassal, living within his regality, to my Lord Torpichen, coming to the behoof of the rebel, who was not relaxed; the Marquis made a second gift for his own behoof to Mr Patrick Shiels, who pursued a declarator. Alleged for the first donatar and the rebel, That the liferent escheat could not fall upon a denunciation only at the market-cross of Edinburgh, and not at the head burgh of the shire; 2. The Marquis was denuded by the first gift. Answered, By the Act 140, Parl. 8, James VI, denunciations at the market-cross, where the justices sit, are sufficient, and the rebel was fugitive for murder; besides, *ex super abundanti*, he was also denounced at Forfar; 2. The party continuing rebel, the first gift fell again under his escheat, single or liferent; to both which the Lords of regality have right. The Lords found that the gift to the rebel's behoof extinguished his escheat, so as the superior could not gift it *de novo*. This is not clear.—*Castlehill's Pratt.* tit. *Escheats*, No. 73.

Page 117, No. 438.

1687. *July.* David Scrymsour *against* Bailie Ædie.

An assignation being intimated at 11 o'clock in the forenoon, and the sum assigned being arrested the same day, without any mention, in the execution, of the hour when the arrestment was laid on, and thereafter an execution being produced specifying the hour;—the Lords brought both in, *pari passu*.

Page 24, No. 122.

1687. *July.* Canon *against* Gordon.

A disposition to one Canon, failing heirs of the disponer's body, with a power to alter or innovate, and the reservation of a liferent, was found valid, though not delivered in the granter's lifetime, nor yet containing a clause dispensing with the not-delivery, in respect it was not a present right, but only a right *in spe*, failing heirs of the granter's body, and contained the above-mentioned reservation.

Page 32, No. 148.

1687. *July.* The Earl of Southesk *against* The Earl of Broadalbin and Sir John St Clare.

Sir Robert St Clare's name being in trust in an adjudication of the Lordship of Caithness, he obliged himself, by back-bond, to denude thereof in favours of the Lord Caithness, or those he should name, upon payment of 100,008 merks,

due to himself, the adjudger, and Orton's being paid and relieved of his cautionary for the Lord Caithness. Sir Robert made over the adjudication, with the burden of Orton's relief, to Broadalbin, who had right to the back-bond, upon receiving payment from him of 100,008 merks. Sir John St Clare was pursued for the payment of Orton's debt, as if the back-bond, *quoad* Orton, had been contravened. Alleged for the defender, 1. The back-bond imports no obligement on Orton, but only a faculty to Sir Robert to have retained the adjudication till Orton's debt might be paid, which he had a prospect to acquire; 2. The disponing the adjudication, with the burden *ut supra*, was no contravention of the obligement. The Lords found the back-bond did import an obligement in favours of Orton; but, before answer to the second, ordained Southesk and Sir John to concur in the process against Broadalbin, either for restating Sir John *in statu quo*, and bringing the adjudication into his person, or for declaring it liable, and really burdened with Orton's debt.

Page 48, No. 214.

[This case is more distinctly reported by Fountainhall.—*26th July* 1687.]

1687. *July.* HOLBURN of MENSTREY *against* DAVID MAIN.

A FACTOR's holograph discharge to tenants, without witnesses, sustained sufficient to found the master's recourse against the factor's cautioner.

Page 59, No. 248.

1687. *July.* ROBERT MUIR *against* The EXECUTORS of his FATHER.

BONDS secluding executors, found to be heritable *ab initio*, as those bearing an obligement to infeft, though the creditor die *ante terminum*; that being only respected in bonds heritable by payment of annualrent, which are not considered as heritable till that be payable. This is misplaced.

Page 80, No. 329.

1687. *July.* JAMES BLAIR, Petitioner.

AN adjudication not being recorded *debito tempore*, the Lords refused to give orders to record it with an antedate. *Vide* No. 835, [———— against ————, February 1688; Dict. p. 13,559.]

Page 80, No. 330.

1687. *July.* JOHN BALLANTYNE *against* The CREDITORS of PROVOST GRAHAM.

A BOND being granted to a man and his wife; and, after their decease, to

————, their son; and the father having recovered a decreet *cognitionis causa*, and died before extracting, the son extracted the decreet in his own name, without transferring the process; and thereupon adjudged. The Lords sustained the diligence against other creditors competing.

Page 80, No. 328.

1687. *July.* CATHARINE GORDON *against* Her STEP-DAUGHTER.

A FATHER'S disposition of lands to his daughter found a tacit revocation of an anterior additional jointure provided to his wife, *stante matrimonio*, out of these lands. *Vide* No. 885, [Sir Alexander Falconer against Barbary Jeffrey, Sir John Falconer's relict; February 1687.] *Page* 99, No. 384.

1687. *July.* ROBERT OAR *against* The BAILIE of DUNSE.

IN a subsidiary action against a bailie of Dunse, for refusing, upon a charge, to receive a prisoner;—it was alleged for the defender, That he was but a magistrate of a burgh of barony that was not obliged to receive prisoners; 2. The prison was a-helping at the time; and the creditor took a bond of presentation from the rebel, to enter himself prisoner at Edinburgh; and, though he failed to do so, the defender is willing to present him *cum omni causa*. The Lords sustained the second defence to liberate the bailie.

Page 193, No. 681.

1687. *July.* CRICHY GRAY *against* POLLOCK MAXWELL.

IN the foresaid cause betwixt Gray of Crichie and Pollock Maxwell, No. 924, [Pollock Maxwell, &c. against Gray of Crichie, February 1687,] a new execution being produced, with a full designation of Hugh Wallace, and the same being also quarrelled as null, for that it was not stamped;—it was alleged for the pursuer, That stamping is in desuetude; but, if that be found necessary, the messenger will yet stamp it, the first execution being truly stamped. The Lords allowed the execution to be stamped, the messenger deponing that the first execution was stamped.

In this cause the Lords found, That actions to the behoof of the king's donatars ought to be inrolled conform to the Act of Parliament. The like was found in Brodie of Lethem's cause. *Page* 261, No. 927.

1687. *July.* BAILIE HAMILTON *against* ————.

NASMITH and Hamilton, bailies of Hamilton, being pursued, *subsidiarie*, for

the debt due by a prisoner, whom Nasmith, by collusion, had suffered to escape; and Hamilton having paid the whole, for Nasmith was insolvent, he raised an action against the electors for choosing an insolvent magistrate. The Lords, finding this a novelty, refused to sustain process.

Page 262, No. 933.

1687. *November.* DAVID MAIN *against* EARL of MARSHALL.

THE Lord Marshall having acquired an apprising against his brother's estate, to whom he was apparent heir, from Major Keith, for which he, my Lord, deponed that he gave a bond of 300,000 merks;—the Lords, suspecting some collusion in the matter, appointed trial, before answer, if the sums in that bond were truly paid to the Major, or if the bond was retired without payment, and if the debt was confirmed in the Major's testament, that the creditors might redeem for the sums truly paid. *Page* 80, No. 331.

1687. *November.* JOHN HAY *against* WILLIAM BORTHWICK.

A BOND, without an onerous cause, sustained as a good title in reduction upon the Act of Parliament 1621; and the pursuer, being an assignee, though not a conjunct person to the cedent, was ordained to condescend upon the onerous cause of his assignation, *ad hunc effectum*, to get the cedent's oath, if the cause was not adequate;—reserving to the Lords what instructions to require. And yet the onerous cause of rights, to elide the Act of Parliament, is probable by oath of the possessor, without condescending.

Page 32, No. 150.

1687. *November* 22. GEORGE WILSON *against* The LAIRD of DUNDAS.

IN a reduction, at the instance of Mr George Wilson, of two small feus he had right to the superiority of from the Laird of Dundas, upon this ground, that the vassal's right contained a clause of extinction, in case three years' feu-duties should be suffered to run in the fourth; and the said irritancy was incurred;—Alleged for the defender, That any such failyie, before the disposition, could only operate in favours of the disponer; and, as to any failyie in the payment of feu-duties since that time, the defender was in ignorance, and not guilty of contempt towards the pursuer, who is a new superior. Answered for the pursuer, That his disposition carried *omne jus*, and the casualty, by a preceding incurred irritancy, was not reserved; 2. The pursuer's right was published by his infeftment under the seal; and minority doth not interrupt the course of either legal or conventional irritancy, nor of actual rebellion. The Lords thought the process severe, and found the *mora* purgeable by the payment of bygones at the bar. *Page* 159, No. 572.

1687. *December.* JAMES ROOM *against* ROBERT CLELAND.

JAMES Room, of London, having charged and denounced James Weir, his debtor, from whom James Cleland got, after the denunciation, an assignation for a debt due before the horning, and Room having, some months after the assignation was intimated, procured a gift of escheat upon his own horning, there arose a competition between him and the assignee. Alleged for the donatar, That, although the Lords have preferred assignees, and the receivers of voluntary rights, where they recovered payment, or got the debt innovated by a new security in their own favours, the competing assignee here can claim no preference, in respect the debt assigned is still unuplifted, and no innovation of the former security made. Answered, There is no rational difference, whether the sum be uplifted or not; for, *jus est plene quæsitum* to the assignees, and the cedent's property altered by the intimated assignation; nor can consumption alter the case, seeing the subject is as much extant, after a new bond, as if the old had remained; 2. Whatever might be pretended, had the donatar prosecuted his horning with ordinary diligence, yet, he having lain off two years before he obtained his gift, it were a disturbance to commerce to find, that, during so long a time, persons might not contract with the rebel, and receive payment of their debt, even by voluntary assignations; and here the donatar could not, as a stranger, pretend ignorance of the horning, which was his own deed. The Lords, in respect of the donatar's so long negligence, preferred the assignee to him. And, if the donatar had insisted upon the Act of Parliament 1621, the same defence of negligence would have been obtruded. *Vide* No. 91, [John Chancellour against Major Baitman, February 1687;] and No. 153, [Laurence Gellaty against Stuart, 3d February 1688.]

Page 118, No. 439.

1687. *December.* THOMAS FENDER *against* The MAGISTRATES of HADDINGTOUN.

IN a subsidiary action at the instance of Thomas Fender against the Magistrates of Haddingtoun, for the escape of a prisoner;—Alleged for the defenders, That Claverhouse's troop, who kept guard in the tolbooth, having, upon the king's birth-day, called for the prisoners to drink his Majesty's health, the prisoner had slipped out in the midst of the noise and confusion, *causa improvisa*, but was searched for and retaken before the pursuer knew of his escape. Answered, If such an excuse were sustained, magistrates might elude all actions of this nature, and creditors would have no security; for the design of imprisonment is, that debtors may be induced to pay, *squalore carceris*. The Lords sustained the defence.

Page 193, No. 682.

1687. *December* 6. The TOWN of INVERKEITHING *against* The TOWN OF BURNTISLAND.

THE town of Inverkeithing being erected into a burgh-royal by King Robert

I, with the privilege of the customs of a certain bounds, within which three or four other royal burghs are erected, they pursued reduction, improbation, and declarator against Burntisland and others of these towns; and the defenders having made a production, the pursuers craved certification *contra non producta.* The Lords refused to grant certification; but ordained the pursuers to insist in their declarator.

Page 159, No. 574.

1687. *December* 17. MOIR *against* MOIR.

A BROTHER being pursued on his bond of 1000 merks, due to his sister, his defence was, That, after the bond, he obliged himself, in her contract of marriage, for a greater sum; and *debitor non præsumitur donare.* Which defence the Lords found relevant.

Page 49, No. 216.

1688. *January.* DR GAIRN *against* TOSCHOCH of MONIVAIRD.

ARRESTMENT of goods in the debtor's own possession found to affect, and to be a *nexus realis,* as well as if it had been in the hands of a third party.

Page 18, No. 93.

1688. *January.* CLELAND and PATERSON *against* WILLIAM WILSON.

ONE having apprised lands, after expiring of the legal of a former apprising thereof for the same sums; the first apprising was alleged to have been passed from, in so far as the second was an innovation, at least that the legal of the first was current; just as if, after expiring of the legal, a creditor should receive annualrent of the sums apprised for. Answered, The second apprising was but a corroboration of the first; and, as a wadsetter might [use] requisition and apprise, and yet recur to his wadset, so here the first apprising is not prejudged by the second. The Lords found the first apprising had a current legal, and did not sustain accumulation of annualrents till after the second apprising. *Vide* No. 334, [Lord Yester against Lord Lauderdale, February, 1688.]

Page 80, No. 332.

1688. *January.* COLVILL *against* WILLIAM HALLY.

IN a reduction of an apprising, upon this reason, That, though the bond which was the ground thereof, was payable the next term after the mother's death or the daughter's marriage, the charge was given, and the apprising led, before the

death or marriage was declared;—Answered, The comprising was not led till after elapsing of the term subsequent to the mother's death, and there was no necessity for a previous declarator thereof. The Lords assoilyied from the reduction, and would not so much as find the legal current upon that defect. *Vide* No. 297, [M'Braire of Netherwood against Thomas Rome, December, 1683.]

Page 81, No. 333.

1688. *January* 26. LAIRD of DRUM and THOMAS SOMERVEL *against* CAPTAIN TENENT.

JAMES Tenent, laird of Cairns, having, in anno 1679, disponed his lands to a blank person, containing a dispensation with the not-delivery, and a power to alter, *in articulo mortis;* in the year 1683, he gave a written commission to one Johnston, the writer, or any other person, impersonally, to fill up Captain Tenent's name in the disposition, either before or after his death, and to deliver it. The Captain's name was accordingly filled up, and the disposition remained with the writer, from whom Cairns, in the year 1685, called for it on his deathbed; and, upon the reading, finding it conceived in favours of the Captain's heirs whatsoever, and so disconform to his intention of making a tailyie, was so offended, that he offered to tear it, but was prevailed with to let it continue uncancelled, to be used as a scroll for drawing a bond of tailyie to Captain Tenent, and other heirs-male: but Cairns died before that was done; after whose death, the disposition being delivered to the Captain, a creditor of the defunct's appearand heir of line, raised reduction of it, upon this ground, That as the actual destroying of the disposition would have been *judicium mutatæ voluntatis*, so the recalling of it, in order to an alteration, must annul it; [and] the new right was never perfected. Answered, It were dangerous to quarrel such a right upon the depositions of writer and witnesses; and the recalling on't from the writer, to make some alteration, was not a simple, but a qualified altering; for the instrumentary witnesses will depone, that it was to be in favours of the Captain and his heirs-male, and so no alteration *quoad* him. And, in Brown of Ingleston's case, where the first disposition only contained a dispensation with the not-delivery, and the second and third to the same person differed in some things from the first, the Lords found these posterior rights, though not dispensing with delivery, but accessory, and only alterations and qualifications of the first; and by the § *Iust. quibus modis testamenta infirmantur*, a testator, who began to alter his will, being prevented by death, the first complete testament is invalidated by the imperfect one. The Lords, before answer, ordained witnesses insert, and others present, to be examined; who having deponed that Cairns, on deathbed, resolved to make a tailyie, but gave direction to preserve the first disposition for Captain Tenent's security, in case he, Cairns, should die before the second was subscribed;—the Lords assoilyied from the reason of reduction.

Page 33, No. 152.

1688. *January 27.* JAMES OSWALD *against* CAPTAIN HAMILTON.

IN a competition betwixt James Oswald, as executor-creditor to Ninian Henderson, and Captain Hamilton assignee, by Ninian's son, to a new blank bond taken by the cedent, after his father's death, from one Wauchop, in place of an old bond granted by Wauchop to the defunct; the cedent and Wauchop being both pursued, and the former having deponed that he gave up the old bond, and took the new in place thereof, for saving the charges of confirmation, they were decerned to deliver up the said bond, or pay the money. Alleged for Hamilton, That the debtor ought to be liable to him, as having the blank bond delivered to him; and if he renewed the bond unwarrantably, let him be liable to both, and seek his relief of young Henderson. Answered for Oswald, That his decreet against young Henderson and Wauchop, being prior to the intimation of the blank bond, is preferable thereto; seeing, in a competition with creditors, blank blonds require intimation. Alleged for Wauchop, That he not being obliged to know that the creditor was dead, as he might have retired his bond upon *bona fide* payment, so he might renew a blank bond; and *bona fides non patitur ut idem bis exigatur*. The Lords preferred James Oswald, and found the debtor but once liable.

Page 49, No. 217.

1688. *February.* SIR JAMES DICK *against* WILLIAM DICK of GRANGE.

ONE having got an assignation to a bond in satisfaction, with a provision that the assignee (in case he should not get payment of the bond assigned, by doing diligence by horning, within fifteen days after the term of payment thereof,) might then recur against the cedent; the assignee did no diligence till about two months after the time prefixed, and then intented a pursuit of recourse against the cedent. Alleged for the defender, That the diligence, two months after the time appointed, was not sufficient. Answered, The debtor was in as good case when the diligence was used as he was at the term of payment; and the pursuer got a partial payment, which occasioned the delay. Replied, The condition was precise as to the time; and the debtor was suspected at the date of the assignation, and now is broken and gone; which is the difference betwixt his case and that of Dundas against Wilson, December 1686. The Lords sustained the allegeance and reply, and assoilyied from the relief. *Vide* No. 117. [Dundas of Ballendary against Mr George Wilson of Pleughlands, December 1686.]

Page 24, No. 124.

1688. *February.* JAMES MERCER *against* CUNNINGHAM of BARNS.

ONE Elizabeth Cunningham having granted a bond, mentioning no cause, to Mercer her brother-in-law, or to his wife the granter's sister, or to the heirs of

the marriage, at the next term after her the granter's decease; which falling, to return to herself, her heirs and assignees: The marriage having dissolved without heirs, and the husband having, as fiar, pursued the debtor's executors for the money;—Alleged for the defenders, 1. The bond is conditional, failing heirs. 2. Though there were no condition in the case but a substitution, the defenders have [the] only right as heirs substitute to the pursuer, who is fiar, and liable as an heir. [*Nota*, what follows should be part of the defence.] Answered, The bond being gratuitous, and the pursuer having but a qualified fee, the substitution must be effectual. The Lords found, That the pursuer had but a qualified fee, and decerned him to find caution to restore the money, after her death, to the defenders.

Page 50, No. 219.

1688. *February.* CAMERON *against* ————.

MR Archibald Cameron having [died] after he had gotten a son, [the son] raised reduction of a 1000 merks' bond, taken by him when he had no children, to his cousin in fee, reserving his own liferent upon the grounds of [the] civil law, *ex supernascentia liberorum.* 2. Mr Archibald, before his death, drew an assignation to the said bond, (conform to a power reserved,) with his own hand, which is *judicium mutatæ voluntatis.* 3. *Testamentum imperfectum inter liberos* is sustained. Answered, This part of the civil law hath no place with us. 2. It took only place by the civil law *inter patronum et libertos.* And 3. It was in the case of a total donation, whereas this is but a small part of the defunct's estate. The Lords assoilyied from the reduction. *Vide* No. 146, [David Oswald against Somervel and Boyd, February 1687.]

Page 51, No. 222.

1688. *February.* LORD YESTER *against* LORD LAUDERDALE.

MY Lord Yester having adjudged at Christmas 1686, for principal sum and annualrent, due and accumulated at the Martinmas preceding;—the Lords found, That the accumulated annualrent did not bear annualrent from Martinmas, but from the date of the adjudication; and that no annualrent was due for the two months intervening, by virtue of the personal obligement in the bond, which was the ground of the adjudication, seeing the adjudger did not delay till the term, though now the term is past. *Vide* No. 332, [Cleland and Paterson against William Wilson, January 1688.]

Page 81, No. 334.

1688. *February.* The EARL of ROXBURGH *against* MR JAMES CHISHOLM, Minister of LESLIE.

MR John Chisholm, parson of Leslie, having obtained certification, in a reduc-

tion and improbation, against the Earl of Roxburgh, of rights of some lands annexed to the parsonage of Leslie,—the Earl raised reduction of that certification upon this ground, That he was minor; and his tutors and curators had not recovered his writs after his father's sudden death. The Lords, before answer, ordained the Earl to condescend upon the writs he would make use of in the reduction, and debate upon them; and declared, That if he was found to have the preferable right, the Lords would recal or reduce the certification.

Page 159, No. 571.

1688. *February.* ABDEN and MR DAVID DEWAR *against* PITTREVY.

IN a reduction, at the instance of Abden against Pittrevy, of a disposition granted to the defender's father by the pursuer, upon this reason, That the pursuer, a facile youth, had signed it immediately after his majority, as it was sent up to him at London, of design to exclude his succession, by an ill wife he had married, who is now dead without issue,—and the pursuer hath now hopeful children by a virtuous second wife: Again, himself is enormly lesed by the disposition, whereby he hath only reserved a liferent of 3000 merks; and he is willing to allow to the defender all money paid or advanced to or for the pursuer. Answered for the defender, That the pursuer had homologated the disposition, by receiving the annuity of 3000 merks, and granting discharges relative thereto. 2. By a new contract at Dumfermling, the pursuer, who is major, *sciens et prudens*, hath, with advice of his friends, disponed his estate to the defender's father. Replied, By interlocutor of the Lords of Session, the pursuer was allowed to receive the annuity without danger of homologation. 2. The contract at Dumfermling was entered into by the pursuer out of mere necessity, the defender's father having refused to pay him the annuity; and his creditors having forced him to the abbey, therefore the foresaid disposition ought to be reduced upon this material ground of lesion; as was decided 22d February 1688, betwixt Gray of Crichy and the Earl of Lauderdale. The Lords assoilyied from the reduction,—*February* 1688. But this interlocutor was stopped by an after allegeance, that the contract at Dumfermling was entered into upon trust.

Page 161, No. 579.

1688. *February.* The PROCURATOR-FISCAL of PEEBLES *against* GEORGE RUTHERFOORD of FAIRINGTON.

FOUND that a wife may, in *liege poustie*, without an onerous cause, dispone to her husband, or his son, *stante matrimonio*, any interest she would have in her husband's goods by her death, and that such a right needed not to be confirmed, though it was *omnium bonorum*, and not intimated, seeing it could not properly be intimated; and the making mention of it in the son's contract of marriage, took off the suspicion of latency. *Vide* No. 473, [Procurator-Fiscal of Peebles against the Laird of Fairingtoun, February 1687.]

Page 129, No. 474.

1688. *February.* ISOBEL THOMSON *against* MARTHA GRIEVE.

FOUND that a person having a bounding infeftment, which is *ager limitaneus*, could not claim lands without the bounding as part and pertinent.

Page 170, No. 610.

1688. *February* 1. LORD TARBAT *against* The CREDITORS of CROMARTIE.

THE Lord Tarbat, a considerable creditor upon the estate of Cromartie, having raised a sale thereof upon the Act of Parliament, and bought the same at the roup, he craved an extract of his decreet of sale. Alleged by some creditors, That all the common debtor's lands were not rouped, and the remainder, being only fractions, would not go off at so good a rate as if they had passed with the whole. 2. Some having rights transcendant over all the estate, and others having particular localities, it was recommended to the Lords to determine how the price should be distributed; and it was offered, as a just and equal method, that, after payment of the transcendant right as preferable, the remainder of the price should divide *pro rata* of the debt due out of the distinct localities, where there cannot be prior or posterior among rights upon different lands. Alleged by other creditors, That the best rule would be this:—if there were no transcendent right at all; or, if the rest of the estate, beside the special localities, were sufficient to satisfy the transcendant right, without encroaching upon any of the localities, then the creditors of the special localities should be satisfied, *pro rata* of their debt; but, if the transcendant right did encroach upon the localities, then the creditors in the localities should be preferred to the price, according to the priority of their right. The Lords found the defence, that all the debtor's lands were not rouped, not competent now after the roup and the lands sold; but ought to have been proponed when the rental was to be proven, especially seeing the Act of Parliament allows the sale of the whole lands, or a part of them: They found also, that, where there is no transcendant right, or such a one as does not encroach, &c. the debt upon the special localities is to be paid *pro rata debiti*, unless one of the special localities be not a full security for the debt upon it; in which case it is only to be considered *quoad valorem*. But they found, that, where there is a transcendant right encroaching upon the special localities, these localities are to be preferred according to the antiquity of their respective infeftments; 1*st February* 1688:—Although by this means the creditor, by the last right, might chance to be wholly cut off from payment, and yet behoved to lose his security by the locality to which the other had no right; which seems hard, since the Act of Parliament appoints a legal vendition, without consideration of the preference of right. And, as the creditor, having the transcendant right, might have affected the posterior locality, and suffered the other locality to be free, so law may justly do it. Some of the Lords were of opinion, that the creditor, having the transcendant right, should communicate it *quoad* the lands not sold to the creditors having special localities, that they might have a title to these lands, to make up the prejudice done to them by the transcendant right, and might be preferred to

creditors having posterior rights, or to personal creditors, who, upon a diligence, would come in within year and day. In this process, it was also found, that creditors having real rights, though they got but payment, should assign with warrandice from fact and deed, and that it was not enough for them to renounce; and that the expense of the roup and process should come off the creditors who got payment, *pro rata* of the payment.

Page 262, No. 935.

1688. *February* 2. PATRICK TELFER *against* SMITH.

THE Lords granted a warrant to the creditors of one Smith, a London factor, then at Edinburgh, to secure him there, till he should find caution both *judicio sisti* to all the diets of process, and *judicatum solvi*, upon a representation by the creditors that he was returning to London; which seems hard; but, the party having represented that the warrant was calumniously impetrated,—the Lords stopped it. *Page* 56, No. 233.

1688. *February* 2. LADY BOOGHALL *against* The DUCHESS of LAUDERDALE.

A LEGACY, left by the Lady Lauderdale to the Lady Booghall, in a testament wrote by the legatar, not sustained unless otherwise adminiculated; and Lord Shomberg, one of the witnesses, only, was alive, Mr Cloud being dead.

Page 131, No. 479.

1688. *February* 18. The LAIRD of DECKMONT *against* COLONEL BORTHWICK.

IN a pursuit, at the instance of one deriving right from the deceased Hamilton of Deckmont, against Colonel Borthwick, for payment of some bonds due by the Colonel, and assigned to Deckmont, his father-in-law; the defender produced Deckmont's missive letter, bearing, that the defender had left 5000 merks with him for paying these bonds. Alleged for the pursuer, That the subscription of the missive was very suspicious; and the missive was also null for not being holograph, and wanting witnesses. The Lords, upon comparing Deckmont's subscription of the letter with his other true subscriptions, found it very different in the shape of the letters; and found the missive not probative for want of witnesses.

Page 160, No. 577.

1688. *February* 18. DECKMONT *against* COLONEL BORTHWICK.

THE Lords sustained a defence of nullity against a missive not holograph, re-

lating to a sum of 5000 merks, that it wanted writer's name and witnesses; and the subscriber being dead, and his other subscriptions compared, they found the missive suspicious. [See the preceding Case.]

Page 226, No. 809.

1688. *February* 22. GRAY of CRICHY *against* The EARL of LAUDERDALE.

IN a reduction, at the instance of Gray of Crichy, against the Earl of Lauderdale, of a disposition granted to him, then Lord Hatton, by the Lord Gray, the pursuer's author, upon these reasons and qualifications of concussion and circumvention: 1. The defender having called for the Lord Gray's right in a reduction and improbation, they were kept up nine months by his lawyers after production, and refused to be given back. 2. The defender gave a factory to uplift the rents of the Lord Gray's lands, and, *de facto*, did uplift some of them before he could induce him to dispone. 3. The defender was in great power and authority, so as the Lord Gray durst not complain of his actings. 4. The Lord Gray was lesed *ultra dimidium*, in having received from the defender only 21,800 merks for 50,000 merks' worth of land. Alleged for the defender, That the qualifications founded on do neither infer circumvention nor concussion; because, 1. Writs produced in improbations use to ly in process longer than nine months. 2. The bargain was verbally agreed to before the factor's intromission. 3. *Sola potentia* in great men cannot infer concussion, which is a crime; and the Lord Gray was major, *sciens et prudens*, and had free access to judicatories for redress, if wronged. 4. There was no lesion, in respect of a provision in the bond granted to my Lord Dundee's two sisters, authors to the Lord Gray, that the share of any of them dying unmarried should accresce to their brother; and, *de facto*, one of the sisters died unmarried, and the other's share was not worth 21,000 merks: besides, the bargain was a transaction of the pursuer's right, which was then under process at the defender's instance, as donatar of *ultimus hæres* to the Lord Dundee. The Lords, upon advising a probation of the above mentioned qualifications of concussion and material lesion, reduced the Lord Gray's disposition to the defender; but assoilyied him from counting for bygone mails and duties, and ordained the pursuer to restore the price to the defender. This decision proceeded not upon the heads of concussion or material lesion separately, but *super tota materia, junctis jungendis*. *Vide* No. 556, [The Earl of Lauderdale, &c. against the Earl of Aberdeen, 13th January 1692;] and No. 557, [Lord Gray against the Earl of Lauderdale, February 1685.]

Page 160, No. 578.

1688. *June*. FORDEL HENDERSON *against* ALEXANDER BAYN.

A PERSON, pursued as universal successor, was not allowed to renounce, albeit he had reduced his infeftment upon minority and lesion, unless he would renounce, *re integra*, and procure his lady's renunciation of her jointure.

Page 14, No. 73.

1688. *June.* Mr John Currence *against* Sir Charles Hacket.

In a pursuit for payment of a bond, the debtor alleged payment of L.100 sterling thereof, and, for proving, founded upon a receipt of L.50 from James Foulis, and a holograph note written by the creditor upon the back of the bond, bearing, that L.50 was received from Sir Robert Murray. It was alleged for the pursuer, That the receipt and holograph note related to one and the same L.50; and the mistake lay here,—That Sir Robert Murray had treated with the pursuer for Sir James Hacket the debtor, and James Foulis paid the money, and the holograph note was writ on the bond when it was sent to Scotland, that the factor might not pursue for it. 2. The holograph note is not probative, because not subscribed. The Lords sustained the note as a distinct payment.

Page 113, No. 424.

1688. *June.* Marion Monteith *against* Her Brother George.

One, pursued as a vitious intromitter, made this defence, That he had right from the donatar of the defunct's escheat, which was declared. 2. He was executor nominated to the defunct. Answered for the pursuer, That the gift was simulate, and procured by the rebel's own means, as appears from his continuing in possession of the goods all his lifetime, and disposing thereof in his testament when he died. The Lords found the gift was simulate, and decerned against the defender, as vitious intromitter, the testament not being confirmed now several years after the defunct's death.

Page 118, No. 440.

1688. *June* 9. Mr William Thomson's Daughter *against* Duke of Hamilton.

In a pursuit at the instance of Thomson against the Duke of Hamilton upon a precept,—Alleged for the defender, That the precept was null, as wanting writer's name and witnesses, and not holograph. Answered for the pursuer, That he offered to prove the subscription by the Duke's oath. And the Duke having deponed, that the subscription was not his handwrit, to the best of his knowledge, it was alleged, at advising, that the oath was not positive, but only an oath of credulity, and that the precept could be adminiculate by other papers produced by the defender, which imported a homologation of the precept. The Lords found the oath did admit of no other probation.

Page 211, No. 746.

1688. *June* 13. Auchinharvey *against* Duke of Hamilton.

In anno 1637, Duke James Hamilton granted a bond for L.204 sterling, pay-

able to William Muirhead, for the use and behoof of Robertland; which bond the present Duke contended was void and null, upon these presumptions: 1. It bears Belhaven to be cautioner, who is not subscribing. 2. *In anno* 1642, £500 was borrowed from Robertland, and paid in the 1643, which was a better security; and the greater sum is presumed to contain the lesser. 3. In the year 1648, Robertland got a new security, with several cautioners, for £20,000, in the name of Auchinharvey, for his own behoof, and yet did not claim payment or security for the bond in question, for which he had no cautioner. 4. [*Anno*] 1658, the lands of Chelsey were sold by commission; and William Muirhead, though a commissioner, did not claim payment of this bond. 5. The estate of Hamilton, *in anno* 1658, was disposed of for payment of the debts of the family, by commission from the usurpers, and publication made at the market-cross of Edinburgh for that effect; and the creditors came to Hamilton, where the commissioners sat, and got lands and conveyances for their debts; and yet Robertland set up no claim for this bond, although he was in the country, and at the same time assigned the bond to Richard Cunninghame, who intimated the same to the Duke and Duchess, and could never hope to have any satisfaction thereafter, the lands being forfeited, and the Duchess not representing her predecessor. Answered, Robertland being a cavalier, did not trouble the family during the usurpation, when it was in distress; but, *in anno* 1662, process was commenced and insisted in some years. 2. *In anno* 1652, the bond is entered in the court of claims, as appears by the attest of William Welsh, secretary. 3. If presumptions may take away bonds, no man will be secure. The Lords sustained the foresaid presumption to take away the bond.

Page 52, No. 223.

1688. *June* 20. BLACKBARRONY *against* CLERKINGTOUN.

IN a pursuit upon a contract of marriage, for payment of a bond due to the wife by her father, and therein assigned to her husband, against the debtor's grandson, whose father was heir to the debtor, and consenter in the said contract with the wife, his sister;—Alleged for the defender, No process for payment of the bond narrated in the contract, unless the bond itself were produced; and, whatever might be pretended against the debtor in the bond, had he narrated the same in the contract, the narrative ought not to militate against the defender's father, who was but heir to the debtor, and not principally concerned, or obliged to pay, but only a consenter in the contract. Answered, The contract narrates all the substantials of the bond, and the defender's father, who was then heir to the debtor, would not have signed any contract narrating a debt himself would be liable for, had he not been convinced of the truth of it; nor is he a consenter in general, but also in the clause of assigning the said bond. The Lords sustained process on the contract.

Page 263, No. 936.

1688. *June* 23. MAJOR MURRAY *against* BAILLIE of TORWOODHEAD.

MAJOR Murray having pursued Baillie of Torwoodhead, as heir of line to the late Lord Bramfoord,—he alleged, That the Lady Forrester, the Lord Bramfoord's heir of line, who had right to his estate, ought to be first discussed. Answered for the pursuer, That it is declared, by a decreet of Parliament, that my Lord Bramfoord's estate, for preservation of the family, should fall and belong to Edward Ruthven, his grandchild, passing by his mother, the heir of line; which decreet of Parliament cannot be called in question by any inferior judge: and though it be quarrellable, as unjust, before the Parliament, yet creditors are only obliged to discuss the heir of line's unquestionable estate. Replied for the defender, That decreets of Parliament ought only to stand as to persons cited, and not as to such as were never called thereto. Now, the creditor, pursuer, was not cited, but only the Countess Dowager of Bramfoord, and that upon a bill, too, without a process. Duplied, The Act of Parliament, declaring, that sentences of Parliament are not to be quarrelled by inferior judges, doth not distinguish whether parties be cited or not, or if there be or be no compearance; and decrees of Parliament fall not under the act *salvo jure*. The Lords sustained the duply, and decerned against the heir of tailyie.

Page 13, No. 72.

1688. *June* 29. GARDINER *against* The LAIRD of LAG.

[See the prior part of this report, Dict. p. 1082.]

THEREAFTER it was alleged, That diligence by horning and caption, prior to the inhibition, was done on three of the bonds acquired; and any creditor, using prior diligence, may take his payment. Which the Lords sustained as relevant.

Page 34, part of No. 154.

1688. *July*. The LAIRD of ARNISTON *against* WILLIAM BORTHWICK.

ARNISTON having, after citation in a summons of mails and duties, at his instance, upon two infeftments, infeft himself upon another bond, compearance was made for William Borthwick, who craved to be preferred to the pursuer's first infeftment, upon this ground, that they were base till a decreet of mails and duties; and there was a signature for confirmation of Borthwick's infeftment presented in exchequer before Arniston's process, although the confirmation was long posterior. Answered, The presenting of signatures is not considered, but the infeftment thereon. The Lords preferred Arniston for the first infeftments.

Thereafter the pursuer claimed preference likewise for the other infeftment. Answered, That the posterior infeftment could not be clothed by the prior citation. Replied, Borthwick's infeftment being no otherwise clothed than by his producing the same, and competing thereon in the pursuer's process,

that same process must also clothe the pursuer's second infeftment, which is produced and debated on; at least, it must come in *pari passu* with Borthwick's. Duplied, In a competition of base infeftments, the first is always preferable; and the pursuer's second infeftment is posterior to Borthwick's. 2. Though a third party's competing is sustained as a publication of his right, 'tis not so where a pursuer competes in his own process. Triply, A pursuer producing a base right, and competing thereon with a third party, must be as effectual to clothe it with possession, as that third party's right would be clothed by his so doing. The Lords preferred Borthwick upon the first duply. And it was not known but that both infeftments were otherwise unclothed.

Page 170, No. 611.

1688. *July.* ROBERT CAMPBELL, Dean of Guild in Glasgow, *against* GEORGE CLERK.

IT being objected against the intimation of an assignation at the market-cross, to a party out of the country, that it did not design the debtor; it was answered, That the Act of Parliament, appointing the designation of debtors, concerns citations in processes. Which was sustained. *Vide* No. 82, [Rigg against Sir William Primrose, March 1684.]

Page 24, No. 125.

1688. *July* 6. CAPTAIN DALZIEL and His SPOUSE *against* SCOTSTARBET, &c.

MR John Ellis, younger, advocate, having made a bond of tailyie of his personal estate to heirs-male; which failing, to the daughters, with an express provision, That it should not be in the power of any of the heirs of tailyie to uplift the sums, without consent of some persons nominated, except that the daughters may make over their shares in their contract of marriage, with consent of other persons than the former:—Captain Dalziel, who married one of the daughters without the friends' consent, pursued a declarator for obliging these friends to consent, or getting the money, by the Lords' authority, without their consent. Answered for the friends, The succession to the sums, by the pursuer's contract, is not according to the father's destination, but goes to the Captain and heirs, failing children of his wife's body. 2. By a general provision, after all, the sums are not upliftable without consent of the subsequent immediate heirs of tailyie. 3. The father having given the friends a power to consent to the daughters' marriage, and consequently to dissent, that must have the effect of an irritancy, in case of marriage without their consent; and, if their consent had been antecedently required, they had reason to refuse it, seeing the Captain was not able to make a suitable provision on his part, and the terms of the father's destination were altered. Replied, The provision hath no irritancy, or obligement *quoad* the marriage; and many persons make as unequal matches. 2. The general exceptions being posterior to that, except in their contract of marriage, &c. does not derogate to the special; for it is not probable the father would have

made his daughters' portions depend on the subsequent heir's consent. 3. The particular exception must derogate from the destination as well as other things; it not being usual that matches could be had, where tochers are under so strict destinations; besides, the daughter was in fee, and might dispose for such an onerous cause as marriage. The Lords found, that the contract ought not to alter the father's destination, failing bairns of his daughter's body; and the defenders craved the pursuers might find caution in that event.

Page 52, No. 224.

1688. *July* 14. Mrs Effie Scot *against* Daniel Nicolson.

Mrs Effie Scot having transacted a debt contained in her father's bond, on which she was pursued as representing him, and thereafter discovered that the said bond was found among her father's papers after his death, blank in the creditor's name, she raised a declarator of extinction of the bond and transaction; seeing, by the civil law, transactions may be rescinded *super instrumentis falsis*. Answered, Though the bond had been taken out among the defunct's papers, that could not prejudge the defender, a creditor who had it for an onerous cause, and was not *doli particeps*; and transactions are the greatest security of the lieges. The Lords demurred to rescind the transaction; but, before answer, allowed probation as to the point of fact of taking out the blank bond, in order to relief against the uncle Mr James Scot, who was alleged to have taken out the same.

Page 53, No. 225.

1688. *July* 18. Lord Panmure *against* The Vassals of Aberbrothock.

In a poinding of the ground for feu-duties, at the instance of the Earl of Panmure, as lord of erection, against the Vassals of Aberbrothock;—Alleged for the defenders, That this manner of execution is only competent to superiors; and, by the Act 10, Parl. 33, the superiorities of church-lands are annexed to the crown, and the feu-duties only are reserved to the lords of erection, till redeemed by the king; and the execution by horning and poinding, appointed in that Act, is not real execution *contra fundum*. Answered, As the feu-duties remain with the lords of erection as formerly, so the same execution is competent for these as before. 2. An assignee to feu-duties may poind the ground in his cedent's name; *multo magis* may the lords of erection, who are assignees by reservation, poind for theirs.

Page 213, No. 755.

1688. *July* 20. The Lady Harden *against* Craigentinny.

Sir John Nisbet having, *in anno* 1686, disponed, to young Craigentinny, all

debts, sums of money, due by bond, contract, or infeftment, or otherwise, to him, or which should belong to him, the time of his decease, any manner of way; the Lady Harden, Sir John's daughter, confirmed, as executrix *qua* nearest of kin, a matter of £500 of lying money. It was alleged for Craigentinny, That the lying money fell under the disposition to him, as being sums due not upon bond, &c.; and the defunct had declared, in the said disposition, that he had sufficiently provided his daughter, whereby it appeared that he intended no more for her. Answered, That the defunct could not be understood to have disposed of all his moveables, seeing goods and gear are not mentioned; and lying money is considered as a *corpus*, and cannot be said to be due; but *nomina debitorum* come under the terms of sums due. 2. In a deed, *in anno* 1682, where the defunct had disponed all to his daughter, he mentioned lying money *per expressum*; which deed, though it be now altered, demonstrates that, in Sir John's opinion, lying money did not fall under the general sums of money. 3. In a disposition, *anno* 1687, by Sir John to Craigentinny, the granter having repeated the clause in the disposition 1686, he subjoins, after sums of money, these words, viz. *principal, annualrents, and penalty*; which certainly respects *nomina debitorum*. The Lords decerned in favours of the executor.

Thereafter, the Lords found also, That rents, consisting of farms, or money not paid to my Lord Dirleton, or the Lord Chamberlain, before his decease, fell to Craigentinny, as coming under the denomination of debts; but, that the victual paid in was to be esteemed under goods and gear, (which was not disponed,) and so fell to the executor. *Vide* No. 673, [Craigentinny against Lord Dirleton's Daughter.]

Page 34, No. 155.

1688. *July* 20. ROBERT PRINGLE *against* his SISTER ELIZABETH and RUTHERFOORD her HUSBAND.

A FATHER having granted an 8000 merks' bond of provision [to his daughter,] with a quality, that, if she married without consent of her mother and brother, it should be restricted to 6000, and the other 2000 should accresce to the brother; and [she] having pursued the brother for the whole 8000 merks,—he alleged, That she had fallen from 2000 thereof, by marrying without his consent. Answered, 1. The clause of restriction was not known to the pursuer. 2. The mother hath consented, and the defender cannot give a rational exception against the match. Replied, Such clauses are adjected by parents to secure their children from being a prey to unequal persons; and this is not a depriving her of all provision, but only a restriction. 2. The mother's consent was impetrated *ex post facto*, and the husband hath no visible estate. The Lords sustained the answer, and decerned for the whole. Here the husband had an employment.

Page 54, No. 227.

1688. *July* 20. EARNSLAW *against* SIR PATRICK HUME, Advocate.

A BASE infeftment granted, *in cursu rebellionis*, for a debt prior to the rebellion, not being public within year and day, by possession or otherwise, the liferent escheat, as the first public right, was preferable thereto; and it was not regarded that the infeftment was made public after the year and day before the gift and declarator; which is considered as to commerce in moveables.

Page 170, No. 612.

1688. *July* 29 *and* 30. EARL of BALCARRAS and LERMONTH *against* MR WILLIAM GORDON, Advocate.

A COMPRISING being quarrelled, *ad hunc effectum*, to make it redeemable, upon this ground, That a part of the principal sum was paid before apprising, yet the whole penalty was apprised for, which ought to have been restricted to a due proportion;—the Lords caused trial to be made among the writers to the signet, what was customary in such cases, and recommended to some of their number to settle the parties.—29*th July* 1688.

The writers having reported, that, in their practice, they used always to restrict the penalty proportionally to the partial payments;—the Lords found the apprising to subsist as a security for principal sum and annualrents, and accumulations of annualrents, and a proportion of the penalty; but that the informality hindered the apprising to expire.—30*th July* 1688.

Page 81, No. 336.

1688. *July* 30. POWRIE *against* SMITH.

FOUND that the delegation, or innovation of a bond to the same creditor, was not a transaction, although the term of payment of the debt was prorogated, unless there were *aliquid remissum*, some part of the debt given down.

Page 63, No. 267.

1688. *August* 10. KIRCONNEL, Donatar, *against* ALLAN.

ALLAN having pursued one Grier before the criminal court, for theft, and got him declared fugitive, and denounced,—upon application to the Exchequer he procured the fugitive's escheat to be burdened with L.300 sterling in favours of himself, in respect he had lost his goods, and been at great expenses in apprehending the fugitive, and leading a probation of the theft. The donatar of the escheat understanding that Allan had transacted his damage by the stolen goods, and taken assignation to L.1000 due to Grier, he applied to the Exchequer, that the moveables fallen in escheat might not be burdened with any sum in favours of Allan; but that he might be left to seek his recourse against Grier's real

estate, *viz.* 8000 merks due to him by Maxweltoun. Answered for Allan, By the Act 26, Parliament 1661, a party, pursuing a thief *usque ad sententiam*, ought to have satisfaction for his lost goods and his expenses. Replied, The sentence against a thief, in such a case, must be upon conviction; and declaring him fugitive is not sufficient. Duplied, The pursuer could do no more, and he did all that was requisite, having charged the thief, and led a pregnant probation in a precognition before the Council, which would have satisfied an inquest; and it was not his fault that the pannel was not convicted, seeing the Council let him out of prison upon caution. The Exchequer inclined to think, that being declared fugitive was not enough, and that the Act of Parliament required a conviction and verdict; but it being informed, that the sum in Maxweltoun's hand was also moveable, the vote was moved, and the L.300 allocated upon Maxweltoun's debt.

This should not be inserted among the decisions of the Session.

Page 118, No. 441.

1691. *July.* The CREDITORS of COCKBURN of LANGTOUN *against* JOHN BOWER, &c.

A REASON of inhibition received in a ranking, by way of defence, without reduction.

Page 172, No. 621.

1691. *July.* The CREDITORS of COCKBURN of LANGTOUN competing.

OLD Langtoun being obliged, in his son's contract of marriage, to give his son (who was infeft in the fee, with the father's liferent of the whole,) access to the lands for 9000 merks yearly, for the entertainment of his future spouse and the family;—the Lords found the provision was real, and preferable to posterior real creditors, in so far as extended to a competent aliment to the lady, which they modified to 3000 during her husband's life; although it was not secured against creditors by any alimentary provision. But most part of the creditors consented.

Page 171, No. 620.

1691. *July* 8. The CREDITORS of COCKBURN of LANGTOUN *against* HENRY SINCLAIR.

IN competition of confirmations which are consummated by seisin, the first appending of the seal to the charter regulates the preference, though the confirmation and charter in Exchequer be posterior, unless it appear that the keeper of the seal was *in mora* by an instrument taken against him, and the thing be quarrelled *de recenti*.

Page 171, No. 618.

1691. *July* 8. In the Ranking of the CREDITORS of COCKBURN of LANGTOUN,

FOUND, That a citation in a poinding of the ground against the heritor and tenants, *declaratorie*, before the first term of payment of annualrent, when no more diligence could be used, is preferable to any posterior public infeftment intervening before the said first term; but that such a citation will not prefer in prejudice of these, if the annualrenter do not exact diligence to obtain payment, immediately after elapsing of the said first term.—*July* 8, 1691: And yet confirmation or declarator was competent before the first term; and a bare citation may be dangerous.

Page 171, No. 619.

1691. *July* 24. ANDREW BRUCE *against* The CREDITORS of COCKBURN of LANGTOUN.

FOUND, That the tenants of Langtoun, compearing in the baron court before the term of payment, and enacting themselves to pay the annualrent yearly, did not clothe a base infeftment; but that payment of 40,000 merks, and the annualrent thereof, as a part of 80,000 merks, contained in a base infeftment of annualrent, with the creditor's renunciation, clothed the remaining 40,000 merks.

Page 171, No. 614.

1691. *July* 24. SIR THOMAS MONCRIEF *against* The CREDITORS of COCKBURN of LANGTOUN.

FOUND, That young Langtoun the fiar's consenting with his father, was as good as if he had been the principal disponer; and that the price of Borthwick being applied to the payment of debts due by the father and son, the disposition was valid, except in so far as it prejudged any creditor who had done prior diligence, providing the Langtouns were not bankrupt the time of the disposition.

Page 171, No. 615.

1691 or 1692. MR JOHN MONTGOMERY's Case for Horning, and ALEXANDER MURRAY's for Inhibition; in the Ranking of the CREDITORS of COCKBURN of LANGTOUN.

FOUND, That horning execute against an *obæratus* debtor, against whom several diligences were inchoated, did hinder him to gratify by voluntary rights in corroboration of former debts; albeit the debtor did not appear altogether insolvent, nor proved insolvent in the event: and the execution of an inhibition was found

to have the like effect. 2, A creditor having executed horning or inhibition, the same day that another had received a voluntary right by way of gratification, both were brought *in pari passu*, and the priority of an hour sustained to give preference.

Page 172, No. 625.

1692. *January* 13.

THE Earl of Lauderdale and Lord Maitland being decerned in £53,000 sterling, in a process at the king's instance against them, for malversing in the mint,—after the matters of fact and damages had been cognosced by a commission under the great seal, reported, and approven by his Majesty; the king, after extracting of the decreet, signified, by a letter to my lord treasurer, that, upon their disponing the lands of Diddop to the Earl of Aberdeen, then chancellor, and Colonel Grame of Claverhouse, or paying £16,000 sterling to my Lord Aberdeen, and £4000 sterling to Claverhouse, they should have remissions and a discharge of the decreet; whereupon Lauderdale, by a treaty with Aberdeen, agreed to give him security for £100,000 Scots, upon Aberdeen's making over his right by the king's letter to Sir John Maitland, for the behoof of his father; which accordingly was done *hinc inde*, and the £100,000 bond corroborated afterwards by new cautioners. Lauderdale, after Aberdeen was out of the government, raised reduction of the decreet and bonds, upon these grounds:—1. There are several nullities in the decreet; as, that some defences had not received interlocutor; and that Aberdeen was judge and party. 2. There was concussion in the case, in so far as the Earl of Aberdeen, who was then chancellor, and a favourite, threatened the pursuer with a criminal process, unless he complied with all his desires. Alleged for the Earl of Aberdeen, That the decreet or bonds could not be quarrelled; because, 1. The decreet was *in foro*, and homologated by voluntary deeds and securities. 2. The bonds were granted by way of transaction, in so far as the one-half of the sum was abated; and *res transacta* cannot be quarrelled upon lesion. Answered for the Earl of Lauderdale, That, by our law and custom, decreets *in foro* are quarrellable upon nullities; and, after they are opened, there is place for rectification of any lesion. 2. Transactions are quarrellable, both upon the heads lesion *ultra dimidium* and concussion by public persons. Replied, By the current of our decisions, *lesio ultra dimidium* is not sustained to nullify any bargain; and, by the civil law, it was only competent in buying and selling. 2. The qualifications of concussion are not relevant: for, as greatness and power is no crime, it cannot infer concussion; and suppose Aberdeen had insinuated Lauderdale's danger from a criminal pursuit, (which is denied)—that, being a legal procedure, could not be a ground of *justus metus* or concussion; as was found in the case betwixt Sir William Davidson and Wisheart: And here the act was ingeminate and homologated by corroborations, and taking right to my Lord Aberdeen's gift, and suspending Claverhouse thereupon, and taking a remission, and getting an abatement of the one-half of the sums of the decreet. The Lords, before answer, ordained some points of fact, alleged on as qualifications, to be tried; and several of the Lords and clerks were examined; but nothing followed thereon before the Revolution, in respect

the king, by a letter, discharged further procedure. The reduction being insisted in in the winter session 1691, the Lords opponed the decreet upon this nullity, That it was not exactly conform to the interlocutor and warrant thereof; and the foresaid grounds of reduction and answers being resumed, and the probation taken upon the act before answer advised, the Lords reduced the decreet and the bonds, and repelled the allegeance of transaction and homologation. —*13th January* 1692.

The Earl of Aberdeen conceiving himself injured by the sentence, he appealed to the Parliament; *February* 1692.—*Vide* No. 557, [*Gray* against *Lauderdale, February* 1685;] 578, [*Crichie* against *Lauderdale, 22d February* 1688.]

Page 154, No. 556.

1692. *February.* ROLLO of WOODSIDE *against* The CREDITORS of COCKBURN of LANGTOUN.

FOUND, in Rollo of Woodside's case, That his infeftment of property, in security, could not be clothed by Langtoun the debtor's paying annualrent, but only by payment made by the tenants, possessors of the lands infeft, in or by a decreet, or a depending process against them; *February* 3, 1692. Thereafter,—upon a bill given in, representing a distinction between wadsets and infeftments for security, which, like infeftments of annualrent, may be clothed by any payments,—2. That Langtoun was in the natural possession of the lands the time of the payment; and, therefore, payment by him was equivalent as if it had been made by tenants. The Lords found the last representation in the bill relevant.—*February* 1692.

Page 172, No. 627.

STAIR.

DECISIONS

OF THE

LORDS OF COUNCIL AND SESSION,

REPORTED BY

SIR JAMES DALRYMPLE OF STAIR.

1662. *February* 7. JEAN ACHESON *against* The LAIRD of M'LEAN.

DAME Jean Acheson pursues the Laird of M'Lean, as representing their predecessors, who was cautioner in a suspension. The defender alleged, Nothing produced to prove the suspension discussed, but letters of horning upon a protestation, which cannot instruct the protestation. The Lords repelled the defence, in respect of the absence of the register, and the oldness of the horning.

Vol. I, Page 94.

1664. *November* 12. The DAUGHTERS of BALMIRRINO *against* ——————.

THE daughters of Balmirrino having pursued the heirs-male for their portions contained in their mother's contract of marriage, and for a competent aliment until the same were paid, the defender renounced to be heir, and was absent. The Lords advised the contract, by which they found the portion payable at the daughter's age of fifteen, and aliment till that time, but no mention of annualrent, or aliment thereafter; yet they found, that the aliment behoved to be

continued till their marriage, or the payment of their tocher, they being minors, and lesed, by not pursuing therefore at the age of fifteen; but that they could not have annualrent, seeing the contract bore none.

Vol. I, Page 225.

1664. *December* 17. Mr Thomas Paterson *against* Watson.

Mr Thomas Paterson charges Watson to remove from his glebe; who alleged the designation is null, because it is not subscribed by the ministers, designers, but is only the assertion of a notary. *2dly.* By the Act of Parliament 1663, anent glebes, there is an exception of royal burghs, to which ministers' glebes are not due; *ita est* Dysert is a royal burgh. The charger answered to the first, That the having a warrant from the bishop and presbytery, his instrument of designation is as sufficient as a seasine to give right to land. And to the second, The royal burghs excepted must only be understood of such who have not a landward congregation, but are chiefly constituted of an incorporation for trade; but this burgh is notourly known to be but a burgh of barony, holden of the Lord Sinclar; albeit it has the privilege of a vote in Parliament, and is a parsonage. The Lords sustained the designation; but, before extract, ordained the testificat of the ministers, designers, under their hands, to be produced.

Vol. I, Page 242.

1664. *December* 22. Cornelius Inglis *against* Mr Rodger Hog.

Mr Cornelius Inglis, being infeft upon an apprising, pursues a removing; compearance is made for Mr Rodger Hog, who alleged, That he is also infeft, and had charged the superior, though after the first appriser, and had possessed seven years, by lifting the mails and duties; and therefore craved the benefit of a possessory judgment. The Lords, having considered the case amongst themselves, whether an apprising and charge, without infeftment, could give the benefit of a possessory judgment, they were equally divided in their votes; and the President resolved, before he gave his vote, to settle the parties.

Vol. I, Page 245.

1665. *February* 15. The Bishop of Dumblain *against* Earl of Cassils.

The Bishop of Dumblain pursues the Earl's tenants for the teinds of the abbacy of Corsregual, as a part of his patrimony annexed thereto by the Act of Parliament 1617. The defender alleged no process till the Act of Annexation, being but an Act unprinted, were produced. *2dly.* Absolvitor; because the defender had tacks from the king *in anno* 1641; and, by virtue thereof, was in possession, and could pay no more than the duties therein contained, till they were reduced. It was answered to the first, it was notour; and, if the defender

alleged any thing in his favour in the Act, he might extract it. *2dly.* The defender could not claim the benefit of his tack 1641; because the bishops are restored to all they possessed *in anno* 1637; And so not only right, but possession, is restored to them as then, which is as sufficient an interruption, by public law, as if it were by inhibition or citation. Which the Lords found relevant, being *in recenti* after the Act, and never acknowledged by the bishops.

Vol. I, Page 270.

1665. *February* 24. M'GREGOR *against* MENZIES.

THERE being a question arising betwixt M'Gregor and Menzies, upon a decreet-arbitral,—the Lords found the decreet-arbitral null, proceeding upon a submission of this tenor;—submitting to the arbiters, aye and while they meet, at any day and place they found convenient, with power of prorogation, without any particular day for giving their sentence, blank or filled up; because the decreet-arbitral was not within a year of the date of the submission, nor any prorogation during that time.

Vol. I, Page 276.

1665. *June* 8. ——— *against* ———.

THE Lords intimated to the writers, keeper of the signet, and clerk of the bills, an Act of Sederunt, prohibiting general letters, upon presentations or collations of ministers, whether having benefices or modified stipends, until every incumbent obtain a decreet conform; albeit they should produce their predecessor's decreet conform, or a decreet of locality, containing the stipend particularly.

Vol. I, Page 279.

1665. *July* 5. GEORGE DUMBAR *against* The EARL of DUNDIE.

GEORGE Dumbar having charged the Earl of Dundie, as cautioner for the Laird of Craig, to pay 8000 merks of tocher, provided by Craig's sister's contract of marriage; the Earl of Dundie suspends on this reason, That he is but liable for his half, because they were not bound conjunctly and severally. The charger answered, That he was bound as cautioner and full debtor, which was sufficient. Which the Lords sustained.

Vol. I, Page 305.

1665. *December* 23. The LAIRD of CESNOCK *against* LORD BARGANY.

THE Laird of Cesnock and the Lord Bargany and Balcarras being bound,

conjunctly and severally, in a bond; Cesnock, being distressed for the whole, takes assignation, and pursues Bargany for two-thirds; who alleged payment; and, because it was a public debt, he produced an incident *in termino*;—which the Lords sustained not; because it bore no warrant to cite Cesnock the principal party, and the executions were, within forty-eight hours, by one person, in Kyll, Renfrew, Fyfe, and Edinburgh, and so suspected; but they superseded extract of the decreet to the first of November.

Vol. I, Page 351.

1666. *February* 13. The LAIRD of WEDDERBURN *against* WARDLAW.

WEDDERBURN pursues a reduction of a feu granted to Wardlaw, *ob non solutum canonem*, by virtue of a clause irritant in the infeftment. The defender offered to purge, by payment at the bar, and alleged several decisions that it hath been so allowed. It was answered, That was only the case of a reduction upon the Act of Parliament declaring feus null for not-payment of the feu-duty; but, where there is an express clause irritant in an infeftment, that cannot be purgeable at the bar; else such clauses should be useless, seeing, without these, *de jure* the feu-duties behoved to be paid at the bar, or otherwise the feu annulled. The Lords found, That there was a difference betwixt a clause irritant, and upon the Act of Parliament; and so would not admit of purging at the bar simply, unless the defender condescended upon a reasonable cause *ad purgandam moram*; and, therefore, ordained them to condescend.

Vol. I, Page 354.

1666. *February* 16. SHARP of HOUSTON *against* GLEN.

GLEN pursues for mails and duties of some lands. Houstoun compears, and alleges, That he has right to these lands, by an apprising expired. It was answered, His apprising was null; because it proceeded on four bonds, the term of payment of one whereof was not come the time of the apprising; and so, not being due, the apprising was void *quoad totum*. It was answered, The sum was due, albeit the day was not come; and so being but *plus petitum tempore*, he was willing to admit the apprising to be longer time by the double, redeemable after the legal were expired, than all the time he apprised before the hand. The Lords found the apprising void as to that sum. Whereupon occurred to them to consider whether the apprising should fall *in totum*, or stand for the other three bonds; and, if it stood for these, whether a proportionable part of the lands apprised, effeiring to the bond, whereof the term was not come, should be found free, or if the rest should affect the whole lands, as if for these only the apprising had been led. Wherein the Lords were of different opinions, and recommended to the reporter to agree the parties.

Vol. I, Page 358.

1666. *July* 4. JEAN CUNINGHAM *against* CUNINGHAM of ROBERTLAND.

JEAN Cuningham, as donatrix to the escheat of umquhile Sir David Cuningham of Robertland, pursued general declarator against his son: who alleged absolvitor, because the horning was null, seeing the charge and denunciation was only at the market-cross of Edinburgh, whereas, by the Act of Parliament 1597, c. 294, all hornings executed against persons within the realm, dwelling within bailiaries or stewartries, should be executed at the head burgh thereof. *Ita est* umquhile Robertland had his dwelling-house at Robertland, within the bailiary of Cuningham, albeit for a time he was out of the country and was a prisoner of war for the king. The Lords repelled the defence, and sustained the horning, and found that the Act of Parliament met it not; seeing neither the person denounced was within the realm, nor dwelt within the bailiary at that time, but had remained several years in England.

Vol. I, Page 387.

1667. *February* 23. ——— *against* ———.

THIS day there being a query formerly given by the Lord Treasurer, Whether or not there should be a process of forfaulture intented against those who rose in the late rebellion, before the Justice-General, so that the Justice might proceed against them, though absent, by putting the dittay to the trial of an assize, and taking witnesses thereupon; and, upon probation, to proceed to the sentence of forfaulture: or whether probation in absence could not be admitted but before the Parliament:—There were reasons given with the query for the affirmative, *viz.* that there was a special statute for forfaulture of persons after their death, in which case they were absent,—*multo magis* when they were living and contumacious. *2dly.* Because, by the civil law, albeit probation, especially in criminals, cannot proceed unless the defender be present, yet the chief criminal doctors except the case of lese-majesty, as *Clarus Farenatius* and *Bartolus*. *3dly.* That the Parliament proceeds to the forfaulture in absence, not by their legislative authority, but as a judicature; and what is just by them, it is just also by the Justice. The Lords demurred long to give their answer, upon thir considerations, That, by Act of Parliament, it is statuted that probation shall be only led in presence of the party; and that there had never been such a practice for the Justices to forfault absents, but only to declare them fugitives; whereupon, being denounced, their escheat fell, and after their liferent: and that it was not proper to the Lords, especially in cases criminal, to give advice in that which might predetermine the Justice-General and the Justice-Clerk and Advocate, who had been desired to peruse the books of adjournal, and they reported, that they had not found a forfaulture by the Justices in absence; but that they had found that a party accused for treason in holding out a house against the king, was declared fugitive, but they did not find that it was proponed to the Justices to put an absent to an inquest for treason, and that it was repelled. The matter being resumed this day, the plurality resolved for the

affirmative: especially considering that, of old, Parliaments were frequent in Scotland, and now are but rare; and that the Lords of Council and Session were the king's council, to give his Majesty their advice, in general cases, what might legally be done, whether civilly or criminally.

Vol. I, Page 451.

1667. *December* 10. Mr James Straiton *against* The Countess of Home.

Mr James Straiton, minister of Gordoun, having obtained decreet conform, upon an old locality, charges my Lady Home for payment; who suspends, and alleges, That she must be liberated of a chalder of victual contained in the decreet of locality; because, after the said decreet, a part of the parish of Gordoun was dismembered, and erected in a new parish, and the Earl of Home burdened with a new stipend, and the minister of Gordoun liberated of a great part of his charge; in consideration whereof, the minister, then incumbent, quitted a chalder of his decreet of locality, and acquiesced in the rest, without ever demanding any more; and so did his successors now by the space of sixteen or twenty years. The charger answered, That his predecessors' forbearance to lift that chalder cannot instruct his consent; and, though he had expressly consented, he could not prejudge his successor, unless that chalder had been applied to the new kirk by sentence of a judge. The Lords found the foresaid reason relevant against the pursuer, *in possessorio*, aye and while he declare his right. Here it was represented, That the minister had a sufficient stipend beside the chalder in question.

Vol. I, Page 492.

1668. *January* 28. Robert Dobby *against* The Lady Stanyhil, his Mother.

Robert Dobby pursues the Lady Stanyhil, his mother, for an aliment, upon this ground, That, she being provided to a plentiful liferent, being an annualrent of 2,800 merks yearly, there remains nothing to aliment him, the heir, of free rent, being all exhausted by the liferent and annualrent of the debt. The defender alleged Absolvitor, because there is no ground in law nor custom for an aliment to the heir, except the rents were exhausted by real burdens by infeftment. But here, at the defunct's death, there was only this liferent, which was not the half of the rent, and there was no infeftment more. *2dly*. Aliments are only competent to minors: The pursuer is major, and may do for himself. The pursuer answered, That it was alike whether the debts were personal or real; for, if apprisings had been used, they would all have been real; but the pursuer did prevent the same, by selling a part of the land at a great rate, which was all applied to the creditors, and yet the liferent and annualrent of the debt is more than the rent. Neither is there any distinction in the law as to majors and minors, who were not bred with a calling; and therefore Carberry (who was a man of age) got an aliment; and Anthonia Brown got an aliment from her mother, who had an annualrent in liferent, and the debts were

all personal at her father's death, albeit some of them were apprised for before she got her aliment. The defender answered, That there was a sufficient superplus, because she offered to take the lands, or find sufficient tenants therefor, for 4,800 merks yearly, which was £1000 above her liferent, and would exceed the annualrents of all the debts. The Lords found this last defence relevant; but did not proceed to determine whether an aliment would be due where the burden was but by personal debt.

Vol. I, Page 515.

1668. *February* 7. The MINISTER of COCKBURNS-PATH *against* His PARISHIONERS.

THE minister of Cockburns-path, having obtained a designation of a horse and two kine's grass, conform to the Act of Parliament 1661, pursues a declarator of his right thereby. It was alleged Absolvitor, Because the designation was null, in respect it was, by the bishop's warrant, directed to three ministers *nominatim*, and it was performed only by two, the third not having come; and a commission to the three must be understood jointly, and not to empower any two of them, unless it had been expressed; likeas the Act of Parliament anent the grass requires the designation of three ministers. The pursuer answered, That, by the Act of Parliament 1661, the designation of grass is appointed to be according to the old standing Acts anent manses and glebes, which do not require three ministers,—that number being only required by the Act of Parliament 1649, which is rescinded, and not revived as to that point; and, seeing three ministers are not necessary, but that two are sufficient, the designation done by two is sufficient. The Lords sustained the designation, unless the defender show weighty reasons of prejudice upon the matter.

Vol. I, Page 521.

1668. *February* 26. The LAIRD of MILNTOUN *against* The LADY of MILNTOUN.

THE Lady Milntoun, having obtained decreet of divorce against John Maxwell, her husband,—the Laird of Milntoun, having right from her husband to her liferent, which right fell by the divorce, pursued a reduction of the decreet of divorce; wherein the witnesses being examined and reëxamined, the Lords adhere to the decreet of divorce, and assoilyie from the reduction. At which time the Lords having allowed him to insist as in reprobators, he now pursues the same for convelling the testimonies of the witnesses, because they were corrupted and suborned, both by promises and getting of good deed, and being prompted how to swear, as their oath on reëxamination bears: and because their oath is not only suspicious, but impossible; because it is offered to be proven that the parties were *alibi*, at a great distance from the place where the witnesses deponed that they committed adultery, and that for several days and nights thereafter, and before. The defender alleged, That the libel was no ways relevant;

first, In so far as it would convel the testimonies as to the principal points referred to probation, against which no contrary testimonies, either of the same or other witnesses, can be admitted by the law of all nations; otherwise pleas should be infinite; for, if the second witnesses might improve the testimonies of the first, third witnesses might improve theirs, and so without end: and the allegeances that the parties were *alibi* are most irrelevant, and are ordinarily rejected, as being a contrary and incompatible probation; for, this being a crime unlawful at all times and places, albeit the witnesses should have forgotten or mistaken the time, if they be positive in the act, *non obest;* and so proving *alibi* at that time, which is not essential, is of no moment. *3dly*. The reprobators, in so far as they would improve and convel the extrinsic points of the testimonies, *ad hunc effectum*, to render the witnesses infamous, and their testimony invalid as to the whole, which is the proper and only subject of reprobators,—the same is not now competent, unless first, at the time of the taking of the testimonies, the pursuer had protested for reprobators, and had not referred his objections against the hability of the witnesses, to their own oaths, but had only interrogated them of their age, marriage, residence, freedom of partial counsel or corruption, &c.; and, upon the reason of their knowledge in that case, reprobators might have been competent to prove the contrary of these extrinsic points, and so infirm the testimony. But here, the witnesses being examined, especially as to the interrogatories of partial counsel, and as to the reason of their knowledge, and no protestation taken at that time for reprobators, he cannot now make use thereof; and, albeit that reprobators were reserved by the Lords, yet that was not at the taking, but at the advising of the testimonies, when all that is now alleged as to their corruption, arising from the reëxamination, did appear to the Lords, and yet the Lords adhered to the decreet of divorce and first testimonies. The pursuer answered, That he did not intend to convel principally the intrinsic points of the testimonies, but, mainly, to prove their partiality and corruption, and therewith, also, to prove their testimonies were false and impossible. Neither is it essential to protest at the taking of the testimonies; nor is there any necessity that the witnesses' oaths should not be taken on the extrinsic points; but, on the contrary, the intent of reprobators being, that their oaths, as to these extrinsics, being false, they should be found perjured and infamous, and the whole testimonies to fall.

There was no interlocutor, at this time, upon this debate.

Vol. I, Page 536.

1668. *June 25.* INGLIS *against* LAIRD BALFOUR.

THERE being an unprinted Act of Parliament, for uplifting the tax and loan of the shire of Fife, for relief of some noblemen engaged for the shire, *in anno* 1661;—the council did thereafter give commission to certain persons in the shire to convene the persons resting, and accordingly cited the Laird of Balfour; and he not compearing, ordered quartering against him. He suspends, on this reason, That this being a private and particular Act of Parliament, to which he was not called, is *salvo jure*, and could not burden his lands of Creik, because he is singular successor therein to the Laird of Creik. It was answered,

That there is no exception of singular successors in the Act of Parliament; so that this Act, being a reviving of the old rescinded Act, *pro tanto*, it must be in the same case as taxation and maintenance, which is ever accounted *debitum fundi*. It was answered, That these burdens, imposed by the rescinded Parliaments, are not in the same case with other public burdens, especially where it is but a particular Act, relating to particular persons and shires, without citation of them; for, if they had known of this Act, they would have petitioned the Parliament that singular successors might have been excepted, as they were in other Acts of this nature. The Lords suspended the decreet, and found, That, as they were singular successors, they were not liable.

Vol. I, Page 544.

1668. *July* 3. JOHN FRAZER *against* WILLIAM FRAZER.

JOHN Frazer having obtained a decreet against William Frazer, his brother, to deliver a tack of the lands of Boghead, granted to their father and his heirs, to whom the said John is heir,—William suspends on this reason, That he is heir to his father, of the second marriage, and produces his retour; and produces the contract of marriage, including a clause that all tacks conquest during the marriage should belong to the heirs of the marriage; and this tack being acquired during the marriage, the same belongs to him; and albeit it be conceived to the heirs generally, yet, by the contract, the pursuer, as heir-general, will be obliged to assign. It was answered, That this tack was no new conquest, but had been the old possession of the father; and the tack bear the lands to be presently possessed by him. The Lords found this tack to fall under the clause of conquest, unless the pursuer prove that there was an old tack standing, which expired not till the second marriage was dissolved, in lieu whereof this new tack was taken.

Vol. I, Page 548.

1668. *July* 30. SIR GEORGE MACKENZIE *against* The LAIRD of NEWHAL.

SIR George Mackenzie, advocate, having married a daughter of John Dickson of Hartrie, they pursue a proving of the tenor of an inventory of Hartrie's lands, wherein he altered the former substitution of his children in several bonds, and particularly of a bond of 5000 merks, granted by Whitehead of Park, payable to himself, and, after his decease, to Helen Dickson, his youngest daughter, who was married to Ballenden of Newhal; and by the inventory the substitution was altered, and the one half of the bond appointed to pertain to Elizabeth, now spouse to Sir George M'Kenzie, and the other to Helen and Michael. To prove that the same was holograph, because it wanted witnesses, there were produced, for adminicles, the copy of it, written by John Kelloe's hand, Hartrie's nephew, and a judicial instrument, containing the tenor of it, by way of transumpt. But there were some words of difference between the instrument and the copy, which was subscribed by John Ramsay, Hartrie's good-

brother, and Mr John Pringle, Hartrie's good-son;—who, and several others, being adduced as witnesses, deponed, That the principal inventory was produced by Hartrie on his deathbed, and shown to his friends, and by them read; and that the subscribed copy was collationed with the principal by them that subscribed the same, and held in all points; and that the principal inventory was all written with Hartrie's own hand, except an alteration made upon a bond of Tarbet's, which was written by John Ramsay's hand, by direction of Hartrie, some hours before he died, and was not able to subscribe it, with some other alterations in relation to bonds, wherein the children substitute were dead; but that this article, in relation to Whitehead's bond, was all written with Hartrie's own hand. The Lords found the tenor proven, conform to the subscribed copy, and found the said inventory holograph, except in relation to Tarbet's bond, and these other particulars written by John Ramsay's hand; so that holograph was proven, without production of the principal writ, jointly with the tenor, albeit some part of the writ was not Hartrie's hand, but written by John Ramsay's hand; but these, not being subscribed by Hartrie, were in the same case as if they had been omitted forth of the inventory, and the remainder of the inventory, which only was probative, was all holograph.

Vol. I, Page 560.

1669. *January* 19. The CREDITORS of JAMES MASSON *against* LORD TARPHICHAN.

SEVERAL Englishmen, creditors to James Masson, who lately broke, being infeft in several annualrents, out of lands of his, pursue poinding of the ground. Compearance is made for the Lord Tarphichan, superior, and his donatar, to the liferent-escheat of James Masson; who alleged, That James Masson being rebel year and day before these infeftments of annualrent, the ground could not be adjudged, but the profits behoved to belong to the superior and his donatar. It was answered, That the superior or donatar had no interest by the rebellion of James Masson, because, before the rebellion, James Masson was denuded in favours of his son, and he received as vassal; so that the vassal for the time, not having fallen in rebellion, the superior can have no liferent-escheat. The superior answered, That the creditors of Masson having been once vassal, and, as vassal, constituting their annualrents, they could not object upon the right of his son, unless they had derived right from his son. *2dly.* The superior is also creditor, and hath reduced the son's right as fraudulent, in prejudice of him, a lawful creditor. It was answered, That the superior's right, as a creditor upon the reduction, doth not simply annul the son's fee: neither doth it at all restore the father again, because, it being but a reduction to a special effect, *viz.* that the creditor may affect the lands, by apprizing upon his debt, anterior to the son's infeftment,—notwithstanding of his infeftment, the son's fee stands, but burdened with that apprising: so that upon neither ground the superior can have the right of a liferent-escheat of him who once was his vassal but was denuded before rebellion; and which is most competent to the pursuers, as well as if the superior had been denuded, and another superior infeft; if he or his donatar had been pursuing for a liferent, any person infeft in the land might well allege

that he had no interest as superior, being denuded. The Lords found, That, in neither case, the superior or donatar could have interest in the liferent escheat.

Vol. I, Page 584.

1669. *June* 30. The EARL of ARGILE *against* His VASSALS.

THE Earl of Argile, being donatar to the forefaulture of the late Marquis of Argile, his father, pursues an improbation of the vassal's rights, and craved certification. The vassals alleged, No certification against their rights; because any right the Earl had was qualified by the king's gift,—that he should only have lands paying 15,000 pounds, and that the rest should be conveyed to the creditors; and the creditors thereupon claiming the property of the vassals, as falling within the forefaulture, his majesty wrote a letter, declaring, that it was not his meaning, by the gift, that the creditors should have any more lands conveyed to thēm than the remainder of the property belonging to the late Marquis, over and above this Earl's part, and that the superiority should entirely belong to the Earl and his successors; by which his majesty's mind and pleasure is evident, that the Earl should only have the superiority, and not the property of the vassals. *2dly.* The vassals offered to produce what rights they had flowing from the house of Argile; but there could be no certification as to what they had not, in respect of the troubles, especially no certification for want of confirmation of the vassals' rights by the king; because several of the vassals continued loyal to his majesty during all the troubles, and some of them lost their lives in his service, opposing the said late Marquis himself; so that it can never be thought to be his majesty's purpose or pleasure so to restore this Earl, the Marquis's heir apparent, as thereby to forefault the vassals who adhered to his majesty, and who durst not, in time of these troubles, have sought confirmations, his majesty's Exchequer being then in the management of those who were in opposition to him. It was answered, for the pursuer, to the first, That, neither by the pursuer's gift from his majesty, nor by the foresaid letter, there is nothing granted to the vassals in opposition to the Earl's right; but in opposition to the creditors, that they should have no hand in the vassals' estates. Likeas, his majesty, by his last ratification and charter under the great seal, produced, hath most distinctly and clearly expressed his meaning and pleasure, that, by the foresaid gift or letter, his majesty did only exclude the creditors from the estates of the vassals; but thereby declares, that not only the superiority and casualties thereof should belong to the Earl, but the property of all those who had not sufficient rights from the house of Argile, and confirmations from the king, and that the Earl might intent all actions competent of law for that effect. It was answered for the vassals, That, if their true condition and adherence to his majesty had been understood, his majesty would not so have declared; and that, *post jus quæsitum* to them by the king's gift and letter, no posterior declaration impetrated from his majesty should prejudge them; at the least, they humbly craved that the Lords, according to their former interlocutor, would represent the case to his majesty, that his pleasure might be known, and that his majesty might interpose with my Lord Argile, not to insist against the

vassals who had been loyal. It was answered for the Earl, That he had given no just grounds to his vassals to expect, that, though they were in his power, that he would destroy them and annul their rights; and, seeing his majesty had fully and absolutely intrusted them to him, they ought to have rested upon his kindness and generosity, and not to have made all this clamour, where they have no legal defence,—it being no strange nor new thing for the king to give gifts of forefaulture, without any reservation of vassals, who had no confirmation from the king; yea, many times without any reservation of the forefault person's debt: and his majesty has lately so done to the Marquis of Huntly, to whom he gave the estate of Huntly, without reservation either to vassals or creditors, and that upon the forefaulture of the Marquis of Argile, who had right to, and was in possession of, the estate of Huntly, for vast sums of money; and the Earl of Argile has the gift of the remainder of his father's estate, with the burden of more debt than the proper debt of the house of Argile would have been, over and above the debts undertaken for the house of Huntly. *2dly.* Whatever the vassals might plead in point of favour, yet they do not pretend to a defence in law; and the Lords, being judges of the law, ought not to stop the course thereof, upon the insinuations of any party, otherways they may deny the course of law to any of the lieges when they please, upon the account that they think the law hard or rigorous, or the king's grants made conform thereto. And whatsoever the Lords might do in the dubious interpretation of a treaty of peace, to know the king's meaning, yet, *in claris, non est locus conjecturis:* Nothing can be clearer than the king's meaning under his great seal; and all the defenders can pretend is favour, which is no point of right nor legal defence. The Lords granted certification *contra non producta*, conditionally, that what the vassals should produce betwixt and the tenth of November should be received: and left it to the vassals, in the mean time, if they thought fit, to make address to the king, that he might interpose with the Earl in their favours; or to debate any thing they thought fit, when the Earl insisted for reduction of their rights, for want of confirmations, or for maills and duties.

Vol. I, Page 627.

1669. *July* 14. The DUKE of HAMILTON *against* The FEUARS of the KING'S PROPERTY.

THE Duke of Hamiltoun, as collector-general of the taxations, having charged the feuars of the king's property for payment of this current taxation, several of them suspended upon this reason, That, by the Act of Convention, there is abatement given of a third part, to such shires as [lie] in the west and south, in regard their retours are higher than the rest of the country, and yet these of the king's property are charged for the whole. It was answered, That that abatement cannot extend to the feuars of the property, because, in all former taxations, they were distinct both from the temporality and spirituality; and, therefore, though, by the Act of Convention, the temporality of these shires be eased, it will not extend to the property; especially seeing the reason of the Act cannot extend to them,—for the feuars of the property did bear no taxation till the year 1592, and then there was a commission granted for retouring them; and

that complaint of the high retours of the shires being then known, these of the property would doubtless endeavour to have easy retours. It was answered, That the Act of Convention expressly regulating the taxation, both as to the spirituality and temporality, it cannot be thought but that these members did comprehend the whole; and, seeing the property cannot be of the spirituality, it must be of the temporality, which hath the abatement, as to these shires, without exception: and, albeit the property was lately retoured, yet, there being no rule to estimate a merk-land or pound-land's retour by, or how many pounds of real rent makes a pound of retour, there could be no other rule but to make the retour of the property proportional to the remaining lands lying in that shire; so that, where the other lands are generally highly retoured, it is evidently presumed that the property was so retoured; and, seeing the property did of old pay no taxation, it were strange now to make it bear more than the other temporal lands about it. The Lords found that the property of the shires had the same abatement with the rest of the temporality in these shires.

Vol. I, Page 687.

1670. *June* 22. JOHN DOWGLAS of LUMSDEAN *against* ARCHIBALD DOWGLAS.

UMQUHILE Dowglas of Lumsdean dispones his estate to Archibald Dowglas, his son, reserving power to himself, at any time during his life, to burden the estate with four thousand merks: and did thereafter grant a bond of four thousand merks in favours of Elizabeth Lyel, his wife, in liferent, and of John Dowglas, their son, in fee; who thereupon pursues the said Archibald for payment. The defender alleged Absolvitor; because the reservation in the disposition, being in favours of the defunct, can only be understood of a legal power, to burden according to law: *ita est* this bond of provision was granted by the defunct when he was not *in legitima potestate*, but on death-bed: especially seeing the reservation does not bear a power to dispone at any time in his life, *etiam in articulo mortis*, which is the clause ordinarily adjected, when the meaning of parties is, that the power should extend to deeds on death-bed: And thereupon the pursuer hath intented reduction, which he repeats by way of defence. The pursuer answered, That the defence is no ways relevant; because the privilege excluding deeds on death-bed is introduced by law in favours of heirs only, that the defunct may not prejudge his heir on death-bed; but if a party dispone, he may qualify his disposition as he pleases, and he who hath so accepted the disposition cannot quarrel the same; and albeit these words *etiam in articulo mortis* are sometimes adjected *propter majorem cautelam*, yet the words, "at any time during his life," are sufficient to import either in his health or in his sickness. The defender answered, That whatsoever might be alleged, if the disposition had been to a stranger, of that interpretation of the words, yet this disposition being granted to the disponer's own eldest son and apparent heir, it must be understood only of such deeds as might be done against an heir; and here the creditors do also concur, who, in place of the heir, might pursue the reduction, and against whom the personal objection of acceptance cannot be alleged. The pursuer answered, That the defender was not apparent heir; because it is notourly known that his father begot him in adultery, upon the

wife of Sir Alexander Hume, for which adultery she was divorced from her husband; and albeit he did cohabit with her thereafter as his wife, that cannot infer, as in other cases, that she was his wife, because marriage cannot consist betwixt the adulterer and the adulteress, and all their issue are disabled to succeed; so that the pursuer of the reduction is the eldest son and apparent heir, in whose favour the provision is made. *2dly.* Albeit the defender were, or could be apparent heir, yet here, having accepted a disposition of the whole estate, burdened with this provision, his acceptance excludes him, who is thereby bound, and cannot pretend to any privilege of an heir; for, albeit, *re integra*, he might renounce the disposition, and return to bruik as heir, now he cannot, having bruiked by the disposition: and for the creditors' concourse, they are not pursuers, and they may insist in any action competent to them by law, but cannot oppose this personal obligement, whereby the defender, by the acceptance of the disposition in these terms, is become obliged to pay the pursuer the sum in the reservation. The Lords repelled the defence, and found that the reservation, in the terms as it stood, did extend to burdening of the estate at any time the disponer pleased and was in capacity of sense and reason, though on deathbed; and found no necessity to dive in the questions concerning the defender's procreation and capacity of succession, seeing he had accepted and bruiked by the disposition so qualified: and did not admit the creditors to oppose this conclusion, but reserved their rights as accords.

Vol. I, Page 684.

1670. *July* 8. THOMAS KENNEDY *against* ARCHIBALD KENNEDY of CULZEAN.

THE Laird of Culzean having three sons, John, Archibald, and Alexander,—for a provision to Archibald, the second, dispones his lands of Corrowa, and others, with this provision, That, if John should die, and Archibald succeed to be heir, Archibald should denude himself of the lands in favours of Alexander; and, if Archibald wanted heirs of his body, Alexander should be his heir, notwithstanding of any law or custom to the contrary. Thereafter, a few months before the father's death, this fourth son, called Thomas, was born. John, the eldest, and Alexander, the third, are both dead, infants; Archibald falls to be heir, and so the condition exists, in which he was obliged to dispone to Alexander. Thomas enters heir of line to Alexander, and pursues Archibald to dispone the lands to him. It was answered for Archibald, That Thomas, as heir of line to Alexander, can have no right to this provision:—1*st.* Because the provision is only in favours of Alexander, without mention of his heirs. *2dly.* Though it could be extended to Alexander's heirs, yet, it being no heritage to which Alexander could succeed, it is conquest, and would not descend to Thomas, Alexander's heir of line, but would ascend to Archibald, as heir of conquest to Alexander. It was answered for the pursuer, That, in this case, the meaning and intention of the father must be considered by his provision *inter liberos*, which is clear to have been, that Archibald should not have both his estate and these lands of Corrowa, but that the same should descend to Alexander; and, if Thomas had been then born, he would no doubt have provided, that, failyieing of Alexander, Archibald's portion should fall to Thomas; and,

if he had declared that the lands of Corrowa should only belong to the heirs of line, it would undoubtedly have excluded the heirs of conquest. He has done the equivalent; for, having provided the lands to Archibald, and his heirs whatsomever, he does, by a posterior explicatory clause, declare, that, if Archibald died without heirs of his body, Alexander should be Archibald's heir therein, notwithstanding of any law or custom to the contrary; which can have no other meaning than that, notwithstanding by the law, John, as heir of conquest, would succeed to Archibald, wanting heirs of his own, yet Alexander, the younger, who would be heir of line, should succeed; which is as much as to say, that this provision should belong to Archibald's heirs of line, and not to his heirs of conquest; and, consequently, having made no mention of Alexander's heirs, he did also mean Alexander's heirs of line, who is the pursuer Thomas; and the case is so much the more favourable, that, if this failed, Thomas hath neither provision nor aliment. The Lords, considering that both parties were infants, and that, if Archibald should die, Thomas would get all, superseded to give answer anent the heritable right of succession until both parties were major; and, in the mean time, allowed Thomas to possess the profits of the lands, who had no aliment nor provision.

Vol. I, Page 691.

1671. *February* 14. GEORGE BAIN *against* The BAILIES of CULROSSE.

GEORGE Bain pursues the bailies of Culrosse for payment of the debt of a rebel, whom they had suffered to go free up and down their streets; whereupon he had taken instruments against them, and protested that they should be liable for the debt,—seeing *squalor carceris* is justly introduced against debtors that will not pay their debt, and the magistrates of burghs may not take it off in whole or in part; and produced a practick observed by Durie upon the 27th of March 1623,—Smith against the Bailies of Elgine,—where the prisoner being suffered to walk freely upon the streets till he obtained a charge to set to liberty, the magistrates were found liable. The defender alleged Absolvitor; because he offers to prove that this prisoner's going out was necessary, *viz.*—he, being a person altogether indigent, was permitted sometimes to go and mendicate his bread, and once to go to the burial of a child of his own; and immediately thereafter, the pursuers having taken instruments, the rebel was put in ward, and continued there till he died. Which the Lords found relevant to liberate the burgh.

Vol. I, Page 719.

1671. *July* 18. The COUNTESS of CASSILS *against* The EARL of ROXBURGH.

THE Countess of Cassils, in her contract of marriage with the Lord Ker, being provided to £5000, he did, *stante matrimonio*, provide her to an annualrent of 10,000 merks further during her lifetime. And, upon his deathbed, he made two testaments of one date: By the one he nominated his father tutor to his

children, and left to him the provisions of his wife and children: by the other he provided his lady to £5000 more than her contract, and named provisions for his children; but subjoined a clause, that if his father, who was then in England, returned and made use of the other testament, that this testament should be null. The Earl of Roxburgh his father did return, and was infeft as heir to his son, and did ratify his son's bond of provision of 10,000 merks; and, by his testament, did expressly mention his son's former testament; and, by virtue thereof, named tutors to his oyes; and, by a bond apart, gave different provisions to them from those appointed by their father's testament; and this Earl of Roxburgh, being heir of tailyie to him, did, in his contract of marriage, reserve the pursuer's infeftment of this annualrent, and did, many years, satisfy and take discharges of the same; and now she pursues the Earl, as controverting the payment for some years bygone, and in time coming during her life. The defender alleged, Absolvitor; because, the pursuer being competently provided by her contract of marriage, this additional provision was a donation betwixt man and wife; and so, by the law, is revokable at any time during the husband's life, even upon deathbed, or by his testament, not only by a direct revocation, but by any thing that might import a change of his mind; and accordingly he hath revoked the same by his testament produced, adding only £5000 to his lady's provision by her contract: and albeit thereafter the late Earl did ratify and acknowledge this additional provision, yet therein they were *errore lapsi*, not having known of this testament of the Lord Ker, at least not having understood that it imported a revocation of this provision; and therefore may justly now reclaim against it. The pursuer answered, That this testament imported no revocation which it did not mention; neither is the addition of £5000 therein an indirect revocation, which must ever be by an inconsistent deed; but both these conditions are consistent, albeit that, by the testament, it be *modo inhabili*: and it is very like that the testator, being taken with a great fever, did not remember of this provision, or added the other £5000 on this consideration that the former provision was only to take effect after the Earl of Roxburgh's death; so that the Lord Ker's meaning might probably be, to add £5000 during his father's lifetime. *2dly*. Though the testament could import a revocation, yet the testament itself being conditional, only to stand in case his father returned not to Scotland and made use of the other testament of the same date, all the tenor of it, and this restricting clause, is affected with the same condition; so that if the testator had said, that he had restricted his lady's additional provision to £5000 in case his father returned not, but, in that case, left her to his father's provisions, it would be truly a conditional revocation; which condition is purified by the father's return, and providing the lady by his ratification of this bond of provision: nor can it be justly alleged, that both this and that Earl were *errore lapsi*, seeing the testament is produced by the Earl himself, and was never in the lady's hands; and, doubtless, it hath been advised by the late Earl ere he ratified, who was a most provident man, and his ratification is dated at the Canongate, *ubi fuit copia peritorum*: and if ratifications should become ineffectual, or if *errore lapsus* should be relevant upon the ignorance or mistake of the import of a writ, ratifications should be of no effect; but any ground that might defend the ratifier before the ratification, might annul the same, upon pretence that he knew it not; and, therefore, *errore lapsus* is only understood *de invincibili errore facti*, but never *de ignorantia juris, quæ neminem*

excusat. The Lords found, That any revocation by the testament was only conditional, and became void by the Earl's returning and making use of the other testament; and therefore repelled the defence in respect of the reply, and had no necessity to determine anent the confirmation and error alleged.

Vol. I, Page 760.

1671. *July* 28. HADDEN *against* The LAIRD of GLENEGIES.

HADDEN, being donatar to the marriage of the Laird of Glenegies, pursues declarator for the avail thereof. The defender alleged Absolvitor; because, by an Act of Parliament 1640, it was declared, that whosoever was killed in the present service, their ward and marriage should not fall; *ita est*, Glenegies was killed, during the troubles, at the battle of Dumbar. It was replied, That the present troubles could not extend further than to the pacification *anno* 1641; after which there was peace till the end of the year 1648. *2dly*. The Parliament 1640, and all the Acts thereof, are rescinded. It was duplied, That the troubles were the same, being still for the same cause; and that the Rescissory Act contained a *salvo* of all private rights acquired by these rescinded Acts. It was answered, That this was a public law, and the *salvo* was only of particular concessions by Parliament to private parties. The Lords found, That the Act 1640 reached no farther than the pacification by which the troubles then present were terminated. The Lords demurred in this case, upon remembrance of a process before them, at the instance of the Heirs of Sir Thomas Nicolson against the Heirs of the Laird of Streichen, upon the gift of Streichen's ward to Sir Thomas, who died the time of the war, being prisoner by occasion of the war, and after pacification; that they might have seen what they had done in that case; but did not get the practick; and the parties being agreed, they decided in manner foresaid. Wherein this was not proponed nor considered,—that the foresaid Act was always esteemed an exemption after the pacification, during the whole troubles; and no ward for marriage was found due that time, though many fell during the war; and, if it had not been so esteemed, the same motives that caused the first Act to be made, *in anno* 1640, would have moved the renewing thereof after the pacification. And, no doubt, the King and Parliament, *anno* 1650, before Dumbar, would have renewed the same for encouragement in so dangerous a war, if it had not been commonly thought that the first Act stood unexpired.

Vol. I, Page 768.

1671. *November* 30. ANTHONY HAGUE of BIMERSIDE *against* MOSCROP and RUTHERFORD.

ANTHONY Hague, as having a gift of all goods and gear belonging to umquhile Mr William Hague, his goodsire, pursues his debtors for payment: who alleged No process; because the sums in question are heritable; and the pursuer's gift can only extend to moveables, proceeding upon Mr William's being called before the justice *in anno* 1633, for some scandalous speeches against the

king, and not compearing, was declared fugitive, and denounced; which could only extend to his escheat: as was found in the case of William Yeoman and Mr Patrick Oliphant, that Mr James Oliphant being cited before the justices for killing his mother, which is treason, as being murder under the greatest trust; and being declared fugitive, and denounced; yet a gift of his escheat and forefaulture was found only to extend to his moveables: and the certification in criminal letters, even for treason, is only, in case of not-compearance, the moveables shall be escheat but nothing can infer the effects of forefaulture but the doom of forefaulture. It was answered, That, in the case alleged, it was only for petty treason by statute, but this was contumacy in a citation for lese-majesty. The Lords found the defence relevant, and that the gift could only extend to moveables.

Vol. II, Page 15.

1671. *December* 8. CAPTAIN GUTHERY *against* M'KERSTOUN.

CAPTAIN Guthery having married the Lady M'Kerstoun, who was infeft in the miln of M'Kerstoun, with the astricted multures; and the tack of the miln is from Whitsunday to Whitsunday, for farm, whereof the one half is payable at Candlemas, and the other half at Whitsunday;—the liferenter died after Martinmas, but before Whitsunday; and the question having arisen, whether the liferenter had right to the whole rents of the miln that year, 1669, having died after Martinmas 1669; which having been decided before, upon a petition, it was taken to consideration again. Some were of opinion that miln-rents had no legal terms as land-rents, but were due *de die in diem*, as the rent of a salt-pan, coal-heugh, or fishing; because the rent was due for the service of the miln; so that, if the liferenter had been in possession of the miln, and had died so, the heritor would enter to possession, and have the benefit of the whole multures till Whitsunday. But whatsoever might be the case of a miln without land or thirl,—yet, in this case, the Lords adhered to their former interlocutor, and found, that, there being here astricted multures, the same had legal terms, as farms of land, which are Whitsunday and Martinmas: and that the liferenter, surviving both terms, had right to the whole; albeit, by the conventional terms, the one half was due after her death, which, though it delayed her payment till Whitsunday, yet took not away her right established by the running of the legal term at Martinmas:—and therefore adhered to their former interlocutor.

Vol. II, Page 19.

1671. *December* 16. CHISHOLM *against* LAIDLAW.

CHISHOLM and Laidlaw possessing a room *pro indiviso*, Chisholm pursued Laidlaw, before the sheriff of Roxburgh, for constituting a stent of the sums of the room, and for payment of the over-sums; whereof Laidlaw pursues reduction, on this reason, That the decreet was *a non suo judice*, the defender living within the Marquis of Dowglas his regality; whereupon he did not only decline, but

the marquis's clerk compeared and repledged. It was answered, That the pursuer had pursued first before the regality court, but, being denied justice there, and, after probation, the cause not being advised, though often desired, the charger did justly and necessarily pursue before the sheriff; and, for the repledging, it was not till sentence was pronounced; and, though an instrument bear that the marquis's charter was produced, it is offered to be proven, *per membra curiæ*, it was not produced. It was answered, That the repledging was the same day the decreet was pronounced, before the court rose; so the decreet being unextracted, and in the sheriff's power, he ought to have admitted the repledging; and, though the marquis's charter had not been produced, the being of his regality was *notorium* in that place. The Lords would not sustain the decreet, but turned it unto a libel; and, that neither party might be preferred in the sole probation of the stent or over-sums, they granted commission to examine witnesses upon the place for either party.

Vol. II, Page 27.

1671. *December* 19. CUMMING of COULTER *against* GORDON of ACHINDANIE and GORDON of TALPERSIE.

THERE is a decreet-arbitral pronounced betwixt Cumming of Coulter and Gordon of Talpersie, whereof Cumming of Coulter raises suspension and reduction, and insists on this reason, That the decreet-arbitral was most unjust, and he enormly lesed, against both law and equity; because the suspender, having married Talpersie's daughter, he promised him 2000 merks of tocher; and, upon his refusal to pay the same, Coulter took the gift of his escheat: and there being some debts due by Coulter to Talpersie, a submission was made to two friends, and, in case of variance, to an oversman; which oversman not only decerned Talpersie to discharge the escheat, and any further claim which extends to the said additional tocher, but also to discharge a bond of 3000 merks, wherein Talpersie was debtor to Coulter, and which was not submitted; and only decerns Coulter to discharge a bond of 1080 pound, a ticket of fourscore pound, and a ticket of 100 merks, and that upon payment of 300 merks; the value of which escheat was worth 12,000 merks, and the bond of 3000 merks, with annualrents, was come to 9000 merks. It was answered, That there was no injustice or enorm lesion in the decreet-arbitral; because, as for the escheat, it being taken by Coulter, the arbiters might justly decern him to discharge it in favours of his own good-father, being satisfied of his just interest; and they have decerned him more than his interest, both for that and for the pretence of additional tocher, for which he had nothing to instruct; nor did he put the matter to Talpersie's oath before the arbiters; and, though he had, the three tickets, with their annualrents, would have balanced both; and, as for the bond of 3000 merks, Talpersie produced a discharge from ——— Keith, who was Coulter's agent, upon payment of the sum, thirty-seven years ago, since which there was no pursuing of the debt; and though the assignation be lost, the oversman, upon trial of the case, and the common fame that the debt was paid, might justly decern the same to be discharged; for though, in strict law, writ or oath of party doth only take away bonds, yet,

amongst arbiters, other evidences may be sufficient; and there were adminicles extant of the assignation, that might have given ground to prove the tenor thereof by witnesses; and though this bond be not, *per expressum*, submitted, yet all clags and controversies, concerning any bonds or debts, are submitted; which might well comprehend this, especially being so old and controverted a right. It was answered, That, if the submission had been wholly general, relating to claims, or, if it had borne a clause conform to claims to be given in, it might have comprehended this sum; but, being special as to the matters of less moment, without the said clause, it cannot be extended to this sum, especially seeing the oversman is a cautioner in this bond. The Lords found none of the reasons of reduction relevant, but adhered to the decreet-arbitral.

Vol. II, Page 27.

1672. *January 5.* JACK *against* JACKS.

IN the cause mentioned betwixt these persons, debated the thirteenth day of December 1671, it being represented by bill, That the contract of marriage betwixt Jack and his second wife was lost; and desiring, that,—seeing the bond of provision to the bairns of the second marriage did bear to be "in satisfaction of all that the bairns could have by any contract betwixt their father and mother;" which did import that there was a contract of marriage; and this being a provision to children of a second marriage, who ordinarily have provisions by contract; and that it is a natural duty to provide children,—less solemnities in writs by a father, *inter liberos*, may suffice than the greatest requisites required by the Act of Parliament, of two notaries and four witnesses, there being here two notaries and three witnesses. The Lords did also take in consideration another reason of reduction of this bond, That it being clandestine, lying in the father's hand, who, by a public solemn contract of marriage, disponed his lands to his eldest son, and had reservations of liferents for himself and his wife, and a provision in favours of the eldest son of the second marriage; the said contract doth import a revocation of this bond of provision, which was in the father's custody, neither delivered nor registrate: and it would be an act of great fraud if the same, being latent, and not mentioned among the reservations in the son's contract of marriage with a stranger, for a tocher, that upon that latent bond the bairns of that marriage should be excluded or burdened; as was formerly found in the case of the Laird of Glencorss: so that, this bond being so little favourable, the nullity thereof ought not to be supplied. It was answered, That there were specialities in Glencorss his case, not quadrating with this; and that the onerosity of the son's contract could only be *in quantum* it were onerous: and that the presumed revocation of the father cannot be inferred by disponing to his son; because it is offered to be proven, that the father, long thereafter, upon his own expenses, caused deduce an apprising upon this same bond, which doth evidently both adminiculate the subscription, and take off the presumption of revocation. It was answered, That it does not import that the father revoked not this bond of provision by his son's contract, though thereafter he has caused apprise upon this bond; but only that he changed his mind, likely by insinuation of his second wife; which he could not do, after the contract, by the most

solemn and direct writ under his hand; so that this bond, being both fraudulently latent and revoked, cannot be adminiculated by any thing posterior to the contract done by the father, in prejudice of the heir of the marriage. The Lords reduced the bond, unless the contract of marriage betwixt Jack and his second wife were produced, by which he was obliged to give such provisions.

Vol. II, Page 35.

1672. *January 5.* ANDREW BRYSON *against* BARBARA HOME.

IN the cause betwixt Barbara Home and Mr Andrew Bryson, decided [*See Dictionary, page 959,*] wherein the said Barbara, having pursued Mr Andrew for implement of her contract of marriage, and that the lands disponed to him by his father, after the contract, might be burdened therewith, and particularly a tenement at the West Port; and, he having disponed the same to John Johnstoun, that he should be liable for the value; which being referred to his oath, he deponed, That he had disponed it to John Johnstoun, but for a debt due by his father anterior to the disposition; which he might lawfully do; because, by the Act of Parliament 1621, any sums paid by interposed persons to the bankrupt's creditors, are allowed, without distinction, unless other creditors have done prior diligence. It was answered, That that clause could only be understood of those who were not bankrupts, the time of the dispositions, to interposed persons, but who, *ex eventu*, became bankrupt; for, in that case, the interposed person neither could, nor was obliged, to know the creditors, who had done no diligence; and so might pay to any, as the disponer himself might have done. But if the disponer were notoriously bankrupt, as being fugitive and fled, or if the disposition were *omnium bonorum*; as the bankrupt himself could not prefer a creditor, even without diligence, because he behoved to dispone, not only for a just and onerous, but for a necessary cause, which cannot admit of voluntary preference; so neither could the interposed trusted person, by such a bankrupt, gratify or prefer. The Lords found, That there was nothing yet alleged, that Bryson was a notorious bankrupt, or had nothing remaining after his disposition to his son; and that, except in these cases, the interposed person might prefer any creditor to another not having done diligence: but, if they would so condescend, the Lords declared they would take the same to consideration; because the case, whether a notorious bankrupt can prefer one creditor to another, hath not as yet been decided.

Vol. II, Page 36.

1672. *January 9.* The LAIRD of POLMAIS *against* The LAIRD of GLORRAT.

THE Laird of Polmais pursues a declarator,—that a bond of 2000 merks granted by Polmais, Glorrat, Carden, and several other heritors of the shires of Stirling and Clackmannan, to Mr Andrew Oswald, and whereof Mr Andrew gave an assignation blank in the assignee's name,—that the said blank assignation was to the behoof of the pursuer, and the other heritors of the said shires; and was only

to be made use of against Graham of Hiltoun, who was to have uplifted an imposition upon the shire for public use, within the bounds assigned to him, to be uplifted by a division made amongst the heritors; and which being uplifted, and therewith payment made to Mr Andrew Oswald of another sum, for which the said heritors granted bond, at or about the time of this assignation; and, for instructing thereof, adduced an Act of Parliament appointing the shire to be stented for the said other bond, granted to Mr Andrew in stead of this bond, with several acts of the committees of the shires thereanent: And several witnesses being examined *ex officio;* and the said Mr Andrew Oswald, the cedent; and that the blank assignation remained in Carden's hand, during his life, and, after his decease, in Glorrat's hand during his life, and thereafter in this Glorrat's hand, without filling up the name of the assignee, or any thing done thereupon; being considered;—the Lords found the writs, oaths, and evidences adduced, proved sufficiently, that the assignation was to the behoof and intent foresaid, and that the said intent now ceasing, they declared the bond void and null.

Vol. II, Page 39.

1672. *January* 10. PITFERREN *against* CAPTAIN HAMILTON.

PITFERREN and ——,— having right to the imposition for the light of the May, which right is ratified by an unprinted Act of Parliament 1661, appointing three shillings Scots for every ton of ships belonging to strangers, and one shilling six pennies Scots for the ton of every ship belonging to natives, to be paid by the masters, sailors, or others having interest,—pursues Captain Hamilton for the same, as due by a frigate whereof he was captain; who alleged, That he, not being master, was not liable by the said Act. *2do.* That vessels for war, by the king's commission, were not liable for custom, excise, or any public dues, but did pay the tenth and fifteenth parts to the king and admiral for all. The Lords repelled both the allegeances, in respect that the Act was general, without distinction, and the privateers enjoyed the benefit of the light of the May as well as others; and this being the right of a private party, instituted for a very necessary common good, the tenth and fifteenth penny did not take it off.

Vol. II, Page 43.

1672. *January* 12. JOHN KELSO and OTHERS *against* The LAIRD of BISHOPTOUN.

ROBERT Kelso having infeft his eldest son John in his lands of Kelsoland, he and John dispone the lands to Bishoptoun, who granted bond for the price, to pay such sums expressed, the most part whereof were such as John was cautioner [for,] for his father: Many other of Robert's creditors being left out, did arrest in Bishoptoun's hand; and he suspending on double poinding, they alleged, That Robert Kelso, having disponed *in meditatione fugæ*, and becoming thereby a bankrupt, could not prefer one of his creditors to another, but according to their diligence; and so could not prefer those in which his son was cautioner to the

rest; and as for his son's disposition, it imports not, being fraudulent, after the contracting of the other creditors' debts, and containing a clause that the father might burden. It was answered, That the Act of Parliament 1621 hindered no preference of creditors, except only as to those who had done diligence; and, albeit the son's infeftment be with the father's power to burden, yet the son having become caution in contemplation of that right, he might justly have taken a disposition from his father to relieve him, even though he were insolvent; and so might justly, upon the disposition he had, prefer the creditors to whom he became cautioner; neither was his father here a notorious bankrupt, or the deed done *post fugam*. The Lords preferred the creditors, conform to the bond, unless it were alleged that the father had been a notorious bankrupt, or the deed *post fugam*; in which case, they would hear the parties thereanent.

Vol. II, Page 44.

1672. *January* 13. SIR JAMES COCKBURN *against* ——————.

SIR James Cockburn having pursued ——————, and having cited him by the second summons, upon twenty-four hours, being found in the Canongate; —it was alleged, That a citation upon twenty-four hours was never further extended than against persons found in Edinburgh; which cannot extend to any suburbs. It was answered, That the sustaining of such citations was no privilege of Edinburgh, but only in respect of the propinquity of the place; and, by Edinburgh, it was never found that the city was only meant, but all that passes under that common designation, which comprehends the suburbs. The Lords sustained the citation.

Vol. II, Page 44.

1672. *January* 13. BURNSIDE *against* BRUCE.

BURNSIDE having charged Bruce upon a bond, he suspends, and alleges Payment; and refers the same to the charger's oath: and, when he is deponing, he produces a ticket of 100 merks, and of ten dollars, in part of payment of a greater sum; yet the charger depones, That the whole sum was resting, and that this ticket was a part of another sum. The Lords rejected the quality; and found, That the deponer behoved to instruct that there was another debt resting at the time.

Vol. II, Page 45.

1672. *January* 24. ALEXANDER LORRAN *against* HENRY HUME.

ALEXANDER Lorran having a gift, from the bishop of Edinburgh, to be procurator-fiscal of the commissariot of Lawder, pursues Mr Henry Hume to admit

him to the place, and pay the bygone profits since the intimation of his gift. The defender alleged Absolvitor; because his gift from the king to the commissary expresses a power to nominate a procurator-fiscal; and, by the reservation in the Act restoring bishops, gifts granted by the king before are reserved. It was answered, That the fiscal having no gift to himself from the king immediately, the power in the commissary's gift was but *ex stylo*, and by inadvertence, and could not exclude the fiscal nominated by the bishop; especially seeing the fiscal is a check upon the commissary, and lifts the bishop's dues, and so cannot be constituted by the commissary himself. *2do.* That the Act bears an exception of the present, and of the fiscals that then were. The Lords found, That the fiscal nominated by the commissary by virtue of his gift, if he were authorised and admitted by the commissary, before the intimation of the bishop's nomination, that the same was sufficient.

Vol. II, Page 55.

1672. *February 2.* BELL *against* FLEMING.

THIS cause being decided the 20th of January last, the Lords, upon a bill given in to them, whereby the defender offered to prove, that the holograph tickets were for a cause and of a date truly anterior to the arrestment, and that the citation against the common debtor was also before, and that the Dean-of-Guild Court was accustomed to decide such matters;—they found the same relevant to eleid the presumption of collusion, by the poinding made of the goods in the party's custody, in whose hands arrestment was laid on upon debts of their own, and diligence done thereon after the arrestment.

Vol. II, Page 58.

1672. *February* 10. The TOWN of BRICHEN *against* The TOWN of DUNDEE.

THE Magistrates of Brichen pursue the Magistrates of Dundee for payment of the debt of Lawrence Dundass, who, being incarcerated in the tolbooth of Dundee, was suffered to come out of the tolbooth. The Lords having, before answer, ordained witnesses to be examined *hinc inde*, anent the manner of the prisoner's outcoming, and the necessity thereof; the witnesses proved, that he came once out to the kirk to sermon, and several times to get his meat at the jailer's house, and sometimes to the fields, and upon the river by boat, the jailer or his man being still with him; and that he was still valetudinary and sick. There was also an instrument produced taken against him, when he was not [out] upon these occasions; but the prisoner did not escape at any time. Upon all which, the Lords found, That debt did not burden the Magistrates of Dundee; and assoilyied them.

Vol. II, Page 68.

1672. *February* 18. The EARL of NITHSDALE *against* The FEUARS of DUNCOW.

THE Earl of Nithsdale pursues removing against the tenants of Duncow, who alleged Absolvitor; because, they being the ancient farmers to the king in this barony, the Earl of Nithsdale having gotten some pretence of right thereto, did pursue this removing to put them from their ancient feudal tenements, which, by their industry, they had improven above their old rent; and they having raised improbation and reduction against the Earl, and having commissioned some of their number to go with the messenger for using of the citation, the Earl's servants did, by his command and direction, invade and wound them, to the effusion of their blood; and having brought them back to the Earl's house, in their blood, he did approve his servants' deed, and put them in his pit, in prison, three days: so that, by express Act of Parliament, of the date 1594, cap. 219, the Earl hath amitted his cause; for it is thereby declared, That if the pursuer be invaded, he shall have decreet without further probation; and if the defender be invaded, he shall be assoilyied. So that this necessary Act of Parliament for securing of parties in processes, and for the honour of the king's authority, both instructs these poor men's reduction against the Earl, and affords them a perpetual defence in the removing. The defender alleged Absolvitor; because this being a statute exceedingly penal, is not to be extended above the express tenor thereof: and so can only reach to the actual invaders; but no way the Earl, who was absent, and coming home, and finding that there had been some contest and blows betwixt some of those tenants, who came rudely up into his house to summon him, he did put some of them into prison upon the Saturday, and caused his bailie of regality hold court upon Monday; and having tried the fact, he liberated the tenants, and fined the servants; so that the Earl had done nothing but what he might have lawfully done; and it can neither import warrant nor approbation of his servants' illegal deed done in his absence, before it was tried and found by the judge. *2do.* The Earl cannot be liable for command, warrant, or ratihabition by any probation by witnesses; which, in these cases, are not admittable, but only by writ or oath of party. *3tio.* Whatever the invasion may import as to the right of these tenants that were invaded, it cannot be extended to the rest, though they were commissioned by them; there being no such thing contained in the Act, as that the factors or commissioners of parties being invaded. It was replied, That the Act bears expressly, "the invaders, or those that are art and part in the invasion;" which must necessarily be proven by witnesses; because it cannot be imagined that invaders will give writ to instruct it; and it is to be presumed, that those who will so invade, resolve not to confess it, though it were put to their oath: and albeit command or ratihabition in contracts is not probable but by oath or writ, yet, in delinquency, where no writ can be expected, it is. It was duplied, That, albeit the Act bears "that the invasion may be tried criminally, or by recognition," in which case witnesses may be used; but that order not being used in this civil process, witnesses are not receivable in matters of this importance, to lose inheritance; for, in the criminal trial, exculpation would be competent to the other party, who would have witnesses thereupon. The Lords found, That they would not prefer either party to the probation by witnesses, but gave a joint probation; and

superseded to give answer whether the invasion would extend to any more than the persons who were actually invaded, till the probation were closed.

Vol. II, Page 72.

1672. *February* 28. DAME MARGARET FOWLIS *against* GILMOURS.

UMQUHILE Sir Andrew Gilmour, advocate, not having any children for a considerable time after his marriage, disponed his whole means and estate to Dame Margaret Fowlis, his spouse, and her heirs; and, having thereafter one daughter, he disponed of new his estate to his daughter, reserving her mother's liferent, and providing, that, if his daughter died unmarried, and without lawful children, before her mother, she remaining unmarried, that the fee thereof should belong to her mother; and made a testament to the same effect: And some years thereafter his daughter died. Sir Andrew's means being due by bond, which, having no clause of infeftment, belonged to his nearest of kin, and to the nearest of kin of his daughter; and at the time of the daughter's decease, the late President, and the relict of William Baillie, being father-brother and father-sister to the daughter, were nearest of kin. There was no testament confirmed of Sir Andrew's daughter in the President's life;—and now the said Dame Margaret Fowlis pursues a declarator, that Sir Andrew his whole means and estate belongs to her by the disposition and testament; and called Alexander Gilmour of Craigmiller, the President's son, and Margaret Gilmour, relict of the said William Baillie: who alleged Absolvitor; because the terms of the disposition and legacy, in favours of the pursuer, bears expressly—"she remaining unmarried;"—whereby the same is a conditional provision, and cannot be claimed by the pursuer during her life, because she is still capable of marriage; so that it must be understood to be a suspensive condition: And though it should but import a resolutive condition, that the pursuer should be fiar after her daughter, yet so as if she happened to marry, her right ceaseth, she ought to find caution, that in case she marry, to restore. The pursuer answered, That the clause in the disposition and testament did not import a condition, that the pursuer should remain unmarried all her lifetime,—for it is not put as a provision or clause by itself, but is annexed to the daughter's dying without issue before her mother, and she remaining unmarried: so that remaining unmarried can only be understood the time that her daughter deceased without issue or marriage; which is evident to have been the defunct's mind; because he does not provide to whom the means should belong, if she happened to marry thereafter; which certainly he would have done, being so knowing a man. *2do.* By his former disposition, when he had no child, there is no such limitation, but it is absolute. *3tio. In dubio matrimonia non sunt restringenda:* though such a provision might have been valid, if it had been clearly the defunct's mind, yet being at most doubtful, it should be interpret with the greatest freedom to marriage. The Lords found the meaning of the clause to be,—The pursuer's remaining unmarried the time of her daughter's decease, and that it did not import a resolutive or suspensive clause, if she happened to marry thereafter.

Vol. II, Page 82.

1672. *June 5.* MUNGO WOOD *against* ROLLO of POWHOUSE.

MUNGO Wood, merchant in Edinburgh, pursues Rollo of Powhouse, as heir to his father, for payment of a merchant accompt, current for several years, whereof the last articles were within three years of the pursuit. The Lords found the whole probable by witnesses. And, at the advising of the cause, the whole articles of the accompt being fourteen, they were all proven by two witnesses; except some few in the middle of the accompt, not exceeding ten pounds Scots, which was proven but by one witness. And, seeing umquhile Powhouse died shortly after the taking on of the account, so that his oath could not be taken, the Lords took the pursuer's oath of supplement, and decerned for the whole.—One of the witnesses was the receiver of the goods, and the other had been the merchant's servant at the time, who gave them off.

Vol. II, Page 83.

1672. *July* 16. The EARL of EGLINTOUN *against* The LAIRD of GREENOCK.

THE Earl of Eglintoun insisted in the cause debated the second of July instant, against Greenock, for declaring the avail of the Earl of Mount-Alexander's marriage; who held the land, ward of Eglintoun; and gave a wadset-feu thereof to Greenock, with the Earl's consent; which the Lords found to exclude the Earl from burdening Greenock's interest of these lands with the marriage. The Earl now further alleged, That Greenock's right, being but a wadset, cannot have the benefit of the feus allowed by the old statute; and which, by the statute 1606, are only approven when the superior confirms or consents; because the said old statute mentions only proper feus, which are perpetual locations; and where there is a competent feu-duty reserved, which is always interpret to be at least the new retoured duty: But Greenock's right is not perpetual, but under reversion; and, albeit it hath a feu-duty of L. 40, yet it is discharged. It was answered, That, the old statute hath no distinction of feus, whether redeemable or not; and that there is no question but redeemable feus would have been valid before the Act of Parliament 1606; and there is here a competent feu-duy, which albeit discharged, yet it is with the superior's own consent. The Lords found this feu, though under reversion, valid to exclude the ward and marriage, in so far as concerned the wadsetter's right consented to: except to the feu-duty discharged, which they found a necessary consequent of the feu itself; and that the consent to the discharge thereof could only extend to the sub-vassal, but not as to the superior, during the ward, in respect that the old statute did only allow feus with a competent feu-duty: And found, That the superior might declare the avail of the marriage as a debt against Mount-Alexander; and that therewith he might burden the feu, as to Mount-Alexander's right, and might obtain the wadsetter to restrict, and might redeem or apprize the reversion.

Vol. II, Page 102.

1672. *November* 8. JEREMY SPENCE.

THIS day the Lords, having received information that Jeremy Spence, servitor to the Lord Newbaith, had forged his master's hand to a bill of suspension, at the instance of ———, captain of a privateer, against a stranger; and he having been examined thereupon, and confessed the same;—the Lords, with open doors, having called in the whole advocates, found the same to be a forgery, and declared the said Jeremy infamous, and incapable of any office depending upon the Lords; and remitted him to the Justices, and continued him in prison; and ordained the suspension to be recalled, and the same, with the bill, to be cancelled, which was done accordingly.

Vol. II, Page 114.

1672. *November* 15. MAJOR BIGGAR *against* The LAIRD of NIDDRIE.

MAJOR Biggar, having charged Niddrie for payment of a bond, wherein Niddrie was cautioner for Keith of Edmistoun to the Laird of Wolmet, for 7000 merks; given, upon arbitrament, for the mutilation of Wolmet's hand; and bearing a provision, that, before payment, Wolmet should grant a letter of slains, and procure a remission to him;—which being now procured, and Major Biggar having right to the bond, charges Niddrie; who suspends; and alleges, He ought to have retention of a part of the annualrent, conform to the Acts of Parliament 1646, 1647, and 1648. It was answered, That some of these Acts did bear no retention, unless the annualrent had been paid within the year. *2do.* That all these Parliaments were rescinded. It was replied, That the not-payment of the annualrent, within the year, could only be understood when the annualrent was due to be paid in these years; but this being a conditional obligation, that payment should be made upon delivery of a letter of slains, and a remission, which not being obtained, nor offered within these years, the debtors were not *in mora;* and, though these acts be annulled, yet there is a *salvo* of the rights of private parties arising thereby. It was duplied, That there was no distinction of obligations in the acts, whether pure or conditional, and that the condition did only affect the principal sum, and not the annualrents. The Lords found, That the condition affected both; and that retention was due, seeing the debtor was not *in mora,* in payment of the annualrent.

Vol. II, Page 117.

1672. *November* 15. MASTER of FORRESTER *against* The EARL of CALLANDER.

GENERAL Ruthvin, late Earl of Bramford, being forefault in the time of the late troubles, was, by a special Act of Parliament, *in anno* 1662, restored; which act was superseded to be extracted, while, by order of Parliament 1667, it was ordered to be extracted. Whereupon the Lady Forrester, who had right by disposition from her father, and the Lord Forrester her husband, obtained

decreet against the Earl of Callander and others, for re-payment of certain sums upon wadset, belonging to the said Earl of Bramford. And, upon a petition by the Lord and Lady Forrester to the Parliament, in July 1672, complaining, that, by a contract with the Lady Dowager of Bramford, the Parliament's intention, for preserving the Earl of Bramford's memory, would be frustrated, after citation and hearing of the Countess; the Parliament did declare, that their meaning, by the restitution of the Earl of Bramford, was, that his estate should be established in the person of Edward Master of Forrester, procreated betwixt Bramford's eldest daughter and the Lord Forrester, he carrying the name of Ruthvin, reserving to his father and mother the half of the annualrent thereof during their life; and ordained all decreets obtained, or to be obtained for that estate, to be in his name; who thereupon petitioned the Lords, that the decreet against Callander, not yet extracted, might be in his name. Compearance was made for the creditors of the Earl of Bramford and Lord Forrester, who alleged, That the said Act of Parliament could have no effect against them, whose right was preserved by the act *salvo jure;* for, some of the creditors having arrested, and some having gotten assignations intimated from the Lord Forrester, and all of them having right to affect Bramford's estate, as being established in the person of his daughter and husband, by the Act of Restitution, extracted *in anno* 1667, it can neither consist with the justice nor intention of the Parliament, by their late act, to take away the rights of the creditors, but only to alter the fiar, which must be, as the matter stood, the time of the last act; for, if before, if the Lord Forrester and the Lady had disponed, or uplifted the sums, and discharged the same, this supervenient Act of Parliament could never infringe the same; and yet, by an extensive interpretation, it would. It is answered, That, whatever might have been said before the making of the Act of Parliament, yet, it now being made, it hath the force of a law, and cannot be restricted by any other authority than the Parliament. Neither doth it fall within the act, *salvo jure*, which relates only to ratifications and such rights as pass of course; but where the Parliament, of certain knowledge, doth enact any thing, the same can be nowhere judged but by the Parliament. And there is no difference whether the parties concerned be called or not; as was decided by the Lords in several cases observed by Dury, as in the case of the Earl of Rothes, John Stuart of Coldinghame, and several others; and especially in this case, where the Act of Parliament is not a sentence or determination principally concerning the rights of private parties, but is an act of restitution of a person unwarrantably forefaulted; which, though it proceeds upon the grounds of justice, and not merely of favour, yet it cannot be controverted but that,—in the act of restitution, if, at first, the fee had been established in the person of Bramford's grand-child, carrying his name, (but that) it would have been valid, and Forrester's creditors could not have called it in question. And this act being an act explanatory of the former, bearing expressly, that such was the Parliament's meaning, and that it should be in the same case as if it had been so conceived at first; the creditors' collateral interest ceaseth. And if the friends of Bramford had craved it so to be declared, they needed only call the Lady Dowager, the Lady Forrester, and her husband, and not the creditors, whose right would fall in consequence; and though the matter had been represented to the Parliament, they neither ought nor would allowed Bramford's estate nor memory to be absorbed by Forrester's debt; and, for Bramford's own debt, a restitution to his

estate in general will never exclude it. It was answered, That not only the act *salvo jure*, which was the greatest security of the people, did preserve the interest of all the creditors, but likewise the Lords, by a general Act of Parliament, are ordained to decide according to the general laws, and not by acts impetrated by private parties, to the prejudice of others who were not called nor heard; but, above all question, the Lords are interpreters of Acts of Parliament, and may and ought to interpret this, so as to convey the fee to the grand-child, as it was the time of this act, and so with the burden of the debt. It was replied, That there was no real burden affecting the estate, but, at most, arrestments, upon which nothing had followed, and an assignation, in place of a cautioner in a suspension. And here the Parliament having expressly decerned, that this decreet against Callander should be in the person of the grand-child, there neither being title nor process at the creditors' instance produced to crave preference upon,—all that now is in question is, whether the decreet should be extracted in the name of the grand-child, conform to the said Act of Parliament. The Lords found, That now there was no more before them but the extracting of the decreet, which they ordained to be extracted in the name of Edward the grand-child, conform to the foresaid Act of Parliament.

Vol. II, Page 117.

1672. *November* 20. Mr Patrick Hume *against* Brown.

Mr Patrick Hume, as donatar, constitute by Rentoun his father, to the non-entry of the lands of Brownsbank, pursues a declarator of non-entry. It was alleged for Alexander Brown, Absolvitor; because the lands of Brownsbank were holden, of Rentoun or his authors, feu, by William Brown, who wadset the same to Thomas Brown; and, being resigned in his favours, Rentoun would not give him infeftment, but only of a ward-tenor. But Alexander Brown, having apprised both from William Brown, who had the right of reversion, and from Thomas Brown, the wadsetter, did charge Rentoun, the superior, to receive him feu, and offered a year's feu-duty; but Rentoun did unjustly suspend upon several grounds, *viz.* That he had right himself to the property, and that he ought to have a full year's rent of the land, being ward; so that the appriser having done diligence, and the superior being in the fault, he must be in the same condition as if the superior had entered him, which would stop the non-entry. It was answered, That the superior was not in the fault; for the wadsetter, being the only proprietor, and holding immediately of the superior, and the appriser having apprised both from him and from the other who had the reversion, he could only charge the superior to receive [him] in place of the wadsetter, who only was his vassal, the former vassal having no more but only the right of reversion; and, unless the wadset had been redeemed, and the appriser, in place of the old vassal, had been re-invested, he could not have made use of the feu-right granted to the old vassal, but only of the ward-right granted to the wadsetter; so that the superior was not in the fault in not receiving the appriser by a feu-right, upon payment of a year's feu-duty. And, albeit the charge was in the time of the usurpation, when wards had no effect as to their casualities, yet

no superior was obliged to change the terms of their infeftments. The Lords found that the superior was not in the fault, and therefore repelled the defence.

Vol. II, Page 120.

1672. *December* 5. DURIE of DUNTARVIE *against* DRYSDALE.

DRYSDALE, having obtained a decreet of the Lords, many years ago, against Duntarvie, upon accounts of furniture,—Duntarvie pursues reduction and improbation thereof, and craves certification against the subscribed accounts, which was the ground of the decreet. It was alleged, That parties were not obliged to keep such accounts, after so long time, having obtained decreet upon compearance, and production thereof. Whereunto the Lords were inclinable; but it being represented, against the decreet itself, that it was most suspect, and not to be found in the register, the Lords granted certification *contra non producta.*

Vol. II, Page 126.

1672. *December* 5. MR EDWARD WRIGHT *against* LAWRIE.

MR Edward Wright, having employed Lawrie, a messenger, to take Carfirie with caption,—pursues the messenger for payment of his debt, because he had suffered the rebel, whom he had taken, to escape. It was alleged, Absolvitor, Because the pursuer's son, having employed the messenger, promised to go along with him, and assist him in the execution. And, true it is, he deserted him, being on the way with the rebel; and, having none with him but one person, he was not able to carry him to prison; but he went to Humby with him, where the messenger followed him, and there he produced a protection under the king's hand. The Lords found the first member of the allegeance not relevant, unless the rebel had used violence; in which case the messenger ought to have broken his rod, whereby the pursuer might have had the benefit of the deforcement; unless the agreement had been expressly, that, if the employer had deserted the messenger, he should have proceeded no further: but found that member of the protection, under the king's hand, relevant;—reserving to the Lords the consideration of the qualifications of payment of the annualrent therein contained, after production.

Vol. II, Page 126.

1672. *December* 19. The KING'S ADVOCATE and SIR WILLIAM PURVES *against* LOWES.

SIR William Purves, having taken a gift of the waird and marriage of Lowes, pursues for the avail thereof. The defender alleged Absolvitor; because the ground of this marriage is the defender's father's infeftment upon an apprising; and it is offered to be proven, that the apprising was extinct, and satisfied by in-

tromission before his father's death; so that he died not vassal to the king. It was answered, *Non relevat*, unless, in the defunct's time, the apprising had been declared extinct, or an order of redemption used; for, albeit satisfaction of an apprising is receivable, by way of exception, amongst creditors, yet it is not competent against the king or his donatar, unless the apprising had been declared extinct in the defunct's life. The Lords found the defence relevant, that the apprising was extinct by satisfaction with intromission in the defunct's life, seeing thereby the former vassal's right revived, and needed no new infeftment.

Vol. II, Page 137.

1673. *January* 8. STRILING *against* HAMILTON.

STIRLING of Bankel, having feued the third part of the lands of ——— to the Laird of Keir, who had set the two part of the said lands, in tack, to the Laird of Bardowie's predecessor, for several liferents and nineteen years; and the lands being possessed by small divisions, some being roods, and the common pasturage being possessed promiscuously:—Bankel, with consent of Keir, the heritor, obtained a decreet of the baron court, for altering the former division, and dividing the whole land in two entire tenements, wholly separate, one-third to Bankel, and two-thirds to Keir and Bardowie. Bardowie suspends upon this reason, That, he having a long tack, little inferior to heritage, and that the outfield and infield being divided, the division could not be altered without his consent; and specially seeing his tack bore the lands as they were then possessed, which is according to the present division. It was answered, That a tack, of whatever endurance, was never found sufficient to hinder heritors to divide their lands as they pleased, especially if the tacksman had no detriment; and the clause in the tack, "as they were possessed," is a common clause of course, expressing the quantity and extent of the lands set, but not the adjacency thereof, and is ordinary in all tacks; so that, if that could hinder division, scarce any division would proceed; and this being a common interest for the improvement of land, and for good neighbourhood, and being of advantage to both parties, the wilfulness of a tenant, without any reason, ought not to hinder the same. The Lords repelled the reason, and decerned the division to proceed, providing that either party had as much land in value, jointly, as what they now possess severally; without limiting the same precisely to a two part and third part, in respect that, there being a division in small parcels before, the advantage that either party had by that division, or the improvement thereof, ought not, by this division, to be lost.

Vol. II, Page 144.

1673. *January* 14. JAMES SYMONTOUN *against* THOMAS and JOHN BROCKS.

JAMES Symontoun pursues Thomas Brock his apprentice, and John Brock his cautioner upon the indenture, for payment of a merk for each day's absence out of his service. It was alleged for the defender, 1*mo*. That the apprentice's

absence was not in his default, but that he necessarily withdrew, because his master had neither work as a goldsmith, nor did he give the apprentice entertainment, and that he caused the apprentice oversee masons for twenty weeks together. 2*do*. Neither he nor his cautioner can be liable for a merk *per diem*, or any other damage, for his absence; because, by the indenture, the damage by absence is liquidated to two day's service for one; which the apprentice offered, by instrument, to perform. The pursuer answered, That he offered him to prove, that he had both work, and gave sufficient entertainment to his apprentice; and, for his attendance on the masons, it was to a public work belonging to the calling, which every master was appointed to oversee week about. And, for the damage of absence, it is in favour of the master; and he may choose whether to make use of it, or of the true damage. The Lords preferred the master's probation of the sufficiency of his entertainment: but found that he ought not to have employed the apprentice in any other work than his calling; and allowed the time that he was employed to oversee the masons to compense as many of his absent days; and found, that the damage by absence being liquidated by the indenture [to] two days' service for one, that he could pursue for nothing else; and that the offer to make out the service was sufficient, the apprentice now performing the same.

Vol. II, Page 150.

1673. *February* 3. HUGH M'LEOD *against* RORIE DINGWALL.

HUGH M'Leod having obtained decreet against Rorie Dingwall, for the profits of a ferry-boat and fishing, *in anno* 1657, the decreet is now craved to be reduced, on this reason, as being null for want of probation, in so far as the quantities were not proven. It was answered, That, the duties being specially libelled, and defences proponed, without denying the quantities, the pursuer was thereby liberated of probation; and yet he is willing, in fortification of his decreet, to instruct the same. It was replied, That the decreet being null, all defences *in causa* might now be propounded; the decreet, at best, being but to be sustained as a libel. And it was offered to be proven, that the defender was then seven years in possession, by virtue of an infeftment, and so would exclude the pursuer *in judicio possessorio*; which cannot be repelled as competent and omitted, seeing the decreet is null. It was duplied, That this defence, being *dolose* omitted, cannot now be received after sixteen years' time, that the means of probation of interruption hath failed. The Lords found that the decreet might be astructed as to the quantities, without admitting this defence upon the possessory judgment, after so long time; seeing the defence related more to the point of possession than to the point of right.

Vol. II, Page 164.

1673. *February* 27. ——— *against* MOWAT.

A FRENCHMAN having arrested certain sums belonging to ——— Mowat,

factor in Paris, and pursuing to make forthcoming, but the process not being ready to come in by the course of the roll,—the pursuer supplicated, that, in respect the arrestment was loosed, and a cautioner altogether insufficient found, that therefore the Lords would declare the loosing of the arrestment null, and a new arrestment to be granted. The Lords having considered the case, and, finding the cautioner could not be known, but was altogether insufficient, they insinuate to the clerks of the bills, that cautioners taken for loosing of arrestment had been admitted, without any notice of their sufficiency; that, in time coming, the same care should be had of their sufficiency, as of cautioners in suspensions. And, as to this case, the Lords ordained new arrestment to be raised upon this special warrant; and declared the same should be sufficient as to any goods or sums that should happen to be in the hands of Mowat's creditors, the time of the execution of the second arrestment, notwithstanding the former arrestment was loosed; but would not declare the loosing null, as to what these creditors might have paid *bona fide* to Mowat, after the loosing of the first arrestment, and before the execution of the second arrestment.

Vol. II, Page 181.

1673. *July* 4. DAVID MURMAN *against* CAPTAIN FRENCH.

DAVID Murman having obtained decreet against Captain French for spuilyie, or wrongous intromission with forty sheep, he suspends on this reason, That, since the decreet, he had obtained the charger's discharge. The charger answered, That the discharge was elicited from the charger, who is an idiot, and understood not what he was doing, by touching the pen of the notary in subscribing the discharge. It was replied, That idiotry was not receivable till it was instructed by a service of idiotry, as law requires. It was duplied, That a service of idiotry is necessary for taking away all deeds done by the idiot; but, where a particular deed is only questioned, it may be taken away, either upon the reason that the party at the time was not *mentis compos*, or was circumvened, which are relevant reasons of reduction, without a service; and here the charger hath a reduction. The Lords having called for the charger, and finding him a very weak simple person, but not absolutely an idiot, they sustained his reduction upon the circumvention, without a service of idiotry.

Vol. II, Page 203.

1673. *July* 24. CAPTAIN BENNET *against* The MASTER of the PEARL.

CAPTAIN Bennet having taken the Swedish ship called the Pearl, she was adjudged prize;—whereof reduction being raised and disputed, the Lords found the ship and loading prize on these grounds:—That the ship, being bound for Amsterdam, laden with 491 fats of potashes, there were only documents aboard to show the property of 447 fats; and of these a great part was marked with several merchants' marks, and the initial letters of their names; which they found a clear evidence that the property belonged to these merchants, and not to mer-

chants mentioned in the documents, and so were concealed enemies' goods; but if the strangers could produce a document for the whole potashes which they alleged was abstracted by the privateers and company, and whereupon the Lords ordained them to be examined, the Lords, in that case, granted joint commission for proving to whom the property of the ship and goods belonged; but the Lords found, That the skipper and two of the company being Dutch, were not, *per se*, reasons of adjudication, but only of seizure and trial; and that they were adminicles that the loading belonged to [the] Dutch.

Vol. II, Page 220.

1673. *July* 26. AITON *against* SPENCE.

JAMES Spence pursues an adjudication of certain lands belonging to Kinkel, upon the late Act of Parliament. Compearance is made for Aiton of Kinadie, who alleged, That he hath apprised Kinkel's whole lands; and that, by the Act of Parliament, adjudication hath no place where apprising hath preceded. It was answered, That the Act of Parliament excludes adjudications only where apprisings were led before the date of the Act; but this apprising is led after. It was replied, That the compriser had completed his apprising within forty days after publication of the Act; which, as to legal effects, is the same with the date of the Act; because, by a clear Act of Parliament, it is provided, "That Acts of Parliament shall only have effect within forty days after the publication thereof;" and that most necessarily, because the lieges are *in tuto* to proceed according to laws standing, until the notice of the new law may come to their knowledge; which the statute hath determined to be presumed to come to the knowledge of the lieges within forty days after publication. It was duplied, That the Act of Parliament was only to be understood of penal laws. The Lords found, That the apprising being deduced within forty days after publication of the Act anent adjudications, that the apprising was valid, and did exclude this adjudication.

Vol. II, Page 222.

1673. *July* 29. The DUKE of HAMILTOUN *against* HAMILTOUN of MONKLAND.

THE Duke and Duchess of Hamiltoun pursue a declarator against Hamiltoun of Monkland, That a bond of £884 sterling, subscribed by Duke James, commissioner, *in anno* 1646, and left blank in the creditor's name, to have been delivered to Sir James Stuart, who was to advance the money; that the said Sir James caused his correspondent, one Cutler at London, about the same time advance the like sum. Cutler took bond from Duke James, being then in England, for £1060 sterling, which was advanced upon Sir James Stuart's order; and this bond of £884 was either comprehended in it, or there was never any distinct sum advanced therefor. And there being much debated for founding a presumptive probation to take away this bond, and in the contrary;—the

Lords, before they would admit any witnesses *ex officio*, ordained either party to produce all the writs they founded on, and assigned a term to that effect, and granted diligences to either party for summoning such witnesses as they thought fit; to this effect, that, if the Lords, upon perusal of the writs, should find just ground to examine witnesses, the witnesses might be ready without a new term; and the Lords might consider what persons they would allow to be examined as witnesses, of those that should be adduced for either party.

Vol. II, Page 224.

1673. *July* 29. BLAIR *against* BLAIR.

THERE being a contract of sale of lands by Ardlair to Denhead, Denhead was obliged for 2000 merks as the price; whereupon Ardblair obtained decreet, of the Lords, for payment of the sum. Denhead raiseth suspension and reduction, on this ground,—That this sum being the price of land due by a mutual contract, the price could not be demanded till the disponer's obligements, which were the cause thereof, were perfected, *viz.* to cause Bagillo infeft himself in the lands, and resign; after which there is a second contract, whereby Denhead ratifies the decreet against him, and renounces his reduction and suspension; but it is provided, that if, between and such a day, Denhead should obtain decreet against Bagillo for a greater sum, Ardblair should accept of it. The day being elapsed, Ardblair took Denhead with caption; who, being under caption, gave Ardblair a bond for the 2000 merks, and renouncing the obligements in the second contract: Which bond Denhead now suspends on this reason,—That this bond was granted *metu carceris*, he being under caption; and therefore could not hinder him to make use of his defence upon the first contract; and that he could not pay the price till they were secured in the land. It was answered, That, before any caption, he had ratified the decreet whereon caption was used; and that this, being obtained upon a legal diligence, was no extortion, nor could it be reduced *ex capite metus;* for although parties giving bonds after decreets, being under caption, when they get no ease nor transaction, nor do not ratify the decreet, but simply give bond, it is not accounted a homologation, more than if they had paid the money; in which case they must quarrel the decreet; but here the decreet quarrelled was ratified when there was no caption, and the obligements in the second decreet were renounced. The Lords found, That there was here no relevant ground against the execution of this bond, upon pretence of the mutual obligements in the first contract; but reserved them by way of action, as accords.

Vol. II, Page 225.

1673. *July* 31. HAMILTON *against* KENNEDIE.

JOHN Weir having been heritor of the lands of Cummerhead, he wadset the same to Thomas Weir for a small sum. There was a second wadset by John Weir, younger, as being infeft as heir in the lands (by a precept of *clare constat,*)

to the said Thomas Weir, renouncing the former wadset: Kennedie of Auchtifardel did acquire right to this wadset, and Hamilton of Raploch acquired right to the reversion: Thereafter Auchtifardel did take a new right from John Weir, the oy, and infeft him, as heir to his goodsire, passing by his father.—In the competition of which rights, it was alleged for Raploch, That the right of John Weir, the son, could not be quarrelled; because it was perfected by prescription, in so far as he produced the son's seasine *in anno* 1599, and the wadset granted by the son shortly after, which had been clad with possession much more than 40 years, and which was sufficient, without production of the precept whereupon the seasine proceeded, conform to the Act of Prescription; so that the son's right being perfected, no right derived from the oy, as heir to the goodsire, passing by the son, could be respected. It was answered, That the Act of Prescription excepted falsehood; and the son's seasine behoved to be false, because it was offered to be proven that the father lived seven years after the date of the son's seasine; so that that seasine could not make him have right as heir to the father. And there being a mutual probation allowed for instructing the time of the death of the first John Weir, Auchtifardel adduced several witnesses, some past 80, and one past 100 years of age, who deponed, that the first John Weir died *in anno* 1606, or thereby: Which coming to be advised, it was alleged for Raploch, That this probation could not take off the benefit of prescription:—1*mo*. Because it was not positive, bearing only "to be such a year or thereby;" and, in a matter so ancient, where the question was only of the date, the oaths of old doating men could not make a sufficient probation, much less could it take off the adminicles for astructing the seasine, *viz.* the wadset right granted by the son, and mentioning both the seasine and precept whereunto Auchtifardel himself had taken right; and the notary's protocol, bearing, "this and many other seasines set down by their dates orderly, both before and after this seasine, and all before the year 1606. 2*do*. This ground of improbation is but indirect, and not on a necessary consequence; for, if the superior gave a precept of *clare constat* to the son, as heir to the father, and seasine was taken thereupon,—albeit the father had been alive, so that it was the superior's error to suppose him dead,—the precept and seasine would be true, though erroneous and invalid, and 40 years' possession would valid them by prescription; so that, *in dubio*, error is rather to be presumed than falsehood. The Lords sustained the seasine as a true seasine, perfected by prescription, and adminiculated as aforesaid, notwithstanding of the probation in the contrary.

Vol. II, Page 227.

1673. *November* 7. JOHN THOMSON *against* ROBERT ROSS.

JOHN Thomson being infeft, by Provost Mains, in an annualrent of £24 out of certain lands of his, pursues poinding of the ground. Compears Mr Robert Ross, and produceth a public infeftment of property of the same land from Provost Mains; and craved preference, because the infeftment of annualrent was base. The annualrenter replied upon possession, by the heritors' payment of the annualrent before the public infeftment; and, for proving thereof, adduced certain witnesses, who proved certain bolls of victual were delivered by Provost Mains

to Thomson, for payment of the annualrent, prior to the public infeftment. Which was found sufficient, though thereby the public infeftment was excluded.
Vol. II, Page 229.

1673. *November 27.* DAVID KENNOWAY *against* JAMES DAVIE.

DAVID Kennoway, having incarcerated William Cassils, by an act of warding, in the tolbooth of Linlithgow, for £1700, uplifted by Cassils, as his sub-collector of the excise of Linlithgow,—James Davie obtained Kennoway's consent to his liberation, upon granting a bond, betwixt and such a day, to cause Cassils count and pay, or to enter him then in prison, or otherways to pay the sum. Kennoway charges upon this bond. Davie suspends, and alleges That he had fulfilled the same, in so far as, upon the day prefixed in his bond, he presented Cassils to the bailie of Linlithgow, who gave the act of warding, and he refused to accept him; as an instrument, produced, bears; and that day falling to be Saturday, he actually entered Cassils in prison on Monday, where he continued several months. It was answered, That the offer to the bailie was not sufficient without intimation to Kennoway, and actual entry into prison, conform to the bond. *2do.* That Davie consented to let Cassils out of prison thereafter. *3tio.* That, the same day, after that he had offered himself to the bailie, there was a requisition to him to enter in the prison, which he refused, and so was wilfully contumacious, upon the day prefixed; so that Kennoway was not obliged to notice what he did after, nor to dispute whether his condition became worse than before he entered. It was replied, That this being a penal obligation, delay was purgeable, when the difference was inconsiderable, being the next week day, without detriment, and when obedience was offered the very day, though all formalities had not been exactly observed,—seeing it was no pretence, but a true imprisonment for several months; nor is it relevant that the cautioner consented to his liberation thereafter, for the bailies could not warrantably liberate upon his consent; [for] he, having performed his obligement to re-imprisonment, was not further interested. The Lords found the reasons of suspension relevant to liberate the cautioner; but, as to the charger's answer,—of requiring the cautioner to enter Cassils that same day after his offer to the bailie,—it not being debated, the Lords ordained them to be heard before the Ordinary thereupon.
Vol. II, Page 232.

1673. *December 3.* SIR ROBERT DALZELL *against* The LAIRD of TINWALL.

SIR Robert Dalzell, being infeft in the ten-pound land of Achnan, which is a part of the barony of Amisfield, pursues a declarator of property of the moor of Achnan, and that the Laird of Tinwall hath no right thereto, or servitude of pasturage, moss, feal, or divot, therein. Tinwall pursues a declarator of his right of pasturage, moss, feal, and divot, in the said moor of Achnan, as part and pertinent of his lands of Tinwall. Upon both processes, the Lords, before answer, ordained either party to produce such writs and evidents, and to adduce

such witnesses as they could, for instructing their right or possession; and gave commission to one of their own number to visit the bounds, and examine witnesses there. Which being reported, Sir Robert Dalzell produces an infeftment of Sir John Charters, of the ten-pound land of Achnan, having a special bounding, which incloses this moor; and Alleged, That thereby, and by the natural situation of the moor, which is in a great part surrounded by his property, and only touched by Tinwall's property at one place by some few pairs of butts; and that it is denominated the moor of Achnan; and that the neighbouring heritors, whose lands touch far more than Tinwall's, pretend no pasturage in it; and that his witnesses have proven that it is part and pertinent of the barony of Amisfield, whereof Tinwall hath no part; and that Tinwall holds of another superior; and any possession of pasturage, peat, or turf, he hath had, was by Amisfield's tolerance, for the yearly payment of three moss-fowls out of each half-merk land. It was answered for Tinwall, That there is no respect to be had to the bounding charter produced by Sir Robert:—1*mo*. Because it bears to have been granted upon Amisfield's own resignation in his own favours, and doth not proceed upon the resignation of any author obliged in warrandice; who would not have disponed with such a bounding, and warranted the same, if it had not truly been so. But it is easy for any man to make his own bounding as this is. And, by the Act of Parliament 1592, cap. 136, such boundings granted, or to be granted, by the king or any superior, upon the vassal's own resignation, albeit they contain a *novodamus*, shall not be extended to the prejudice of any third party; but the right of property and commonty shall be determined, as if there were no such bounding mentioned. And there is no deed of property proven: For what is informed, of riving out two or three acres of the moor by Sir Robert's tenants, is but inconsiderable, and lately done: neither doth it import that the moor is holden of another superior than the lands of Tinwall; for whosoever is infeft in lands with common pasturage, &c. may prescribe a right, by uninterrupted possession forty years, in any land; for the pasturage and pertinents of lands can no otherways be constituted or known but by long possession, which will add or abate parts of it; which is much more than pertinents. And as for the tolerance of the moss-fowls paid by Tinwall's tenants to Amisfield:—1*mo*. Witnesses cannot prove a tolerance, but writ; neither can these witnesses' testimonies prove *quo nomine* the fowls were paid; for they might have been paid to Amisfield, who was a great man, and a friend to Tinwall, by the tenants, as a gratification; nor doth it appear that Tinwall knew of it. And there is produced a commission by Tinwall to Amisfield, in his absence out of the country, to manage his affairs. And, as to the interruption by Amisfield, the same was only by threatening a tenant of Tinwall's while he was casting of turfs, and doth not relate to the pasturage, and was neither solemn nor reiterate: and, notwithstanding thereof, Tinwall's possession was never stopped, and hath clearly proven possession of pasturage, turf, and moss, for fifty years and above; and though a small interruption might suffice, if the property were clearly Sir Robert's, yet, where it appears to be but a promiscuous commonty, neither party having a clear property, such interruptions, *via facti*, taking no effect by discontinuing the possession, are not redargued. The Lords found it sufficiently proven, that the property of the moor in question belonged to Sir Robert Dalzell, he being infeft in the ten-pound land of Achnan, and this moor of Achnan lying in the bosom of the land, wherein none but Tinwall claims pasturage. And found, that

Tinwall's servitude of pasturage was not constitute by his possession, in regard the same was precarious: the tenants who acquired the possession having paid the moss-fowls; and it being interrupted by the Laird of Amisfield, which several of the witnesses saw: and though they condescend not upon the particular year, yet there being but fifty years, or thereby, of Tinwall's possession of pasturage proven, any time that the late Amisfield was laird, would fall within forty years of Tinwall's possession, the last five years being frequently interrupted by Sir Robert Dalzell.

Vol. II, Page 233.

1673. *December 5.* Dr Hay *against* Andrew Alexander.

Doctor Hay, having apprised the lands of Artrochie, pursues Andrew Alexander, and others, the tenants, for maills and duties, who alleged Absolvitor, because he hath right to the lands by an apprising long anterior to the pursuer's apprysing. It was answered, That the pursuer,—having raised improbation and reduction against George Stuart, Marjory Jamison, and Andrew Alexander,—hath obtained certification against them, improving all their rights. And, albeit there be a reservation in favours of Andrew Alexander, yet certification being granted against George Stuart, doth exclude Andrew Alexander; in so far as George Stuart had apprised the lands in question before Andrew Alexander, and was infeft therein, and so had a right preferable to Andrew Alexander; so that the pursuer, having prevailed against George Stuart, who would have excluded Andrew Alexander, *vincit vincentem.* It was replied, That the common brocard hath many exceptions, and can never be extended to a certification, or an improbation, which doth only take away the right quarrelled, and communicates nothing thereof to the pursuer: and, it being but a certification, it hath no effect but as to the pursuer Dr Hay; so that George Stuart might yet make use thereof against Andrew Alexander. The Lords found, That the certification against George Stuart's prior apprising could not operate against Andrew Alexander's apprising, though posterior to George Stuart's.

Vol. II, Page 235.

1673. *December* 13. Sir Francis Clerk *against* Smeitoun.

The ship called the Calmer being adjudged prize by the admiral, and brought in question by reduction before the Lords, they adhered to the admiral's decreet, except as to a parcel of brass wire; which, being alleged to be the proper goods of Sir Francis Clerk, merchant in London, the Lords gave commission to the Lord Mayor of London to examine witnesses thereupon; which being reported, they found the brass wire to be the proper goods of the said Sir Francis Clerk. It was alleged for the privateer, that, though this wire belongs to Clerk, yet it must be confiscated with the ship and loading:—1. Because, as to this wire, there was no document at all aboard. *2do.* Because the ship being declared prize upon this ground mainly, that the skipper was a Hollander, and

nothing instructed of his domicile in Sweden, and that he was an eight-part owner of the ship; and therefore, by the custom of nations, and the king's instructions, "a part of the ship belonging to the king's enemies" confiscates the ship and loading. It was answered, That the king's subjects, residing in his dominions, are necessitated to carry on a covered trade; and therefore the presumptive probation, which is inferred from want of documents, false documents, throwing of papers overboard, or the like, do always admit a contrary probation of the property: which doth not hold as to neuters, or others living abroad, who, being free to trade with both parties, need no such contrivances; and therefore the presumption is so strong that the ship and goods belong not to free men, but to enemies, that it admits no contrary probation of the property, unless it be in the case of the defect of some formalities requisite in the passes by the treaties. And albeit a part of the ship belonging to the king's enemies forefaults the whole, and the loading,—the ground in justice whereof is, that the other parties concerned do concur with the king's enemies in carrying on of their trade,—yet that cannot be extended to the king's subjects residing in his dominions, giving order to their factors abroad to send them home goods; or, if without their knowledge, such goods being embarked in ships whose documents bear them to be free ships, but, being convelled by the oath of the skipper; his Majesty's subjects are innocent of the interest of any enemy. Neither can they secure themselves better, unless they were abroad for the time; so that they might, and ought, to cause the skipper depone upon the property of the ship and loading: whereas oft-times false passes are taken out without oath, and are found false by the oath of the skipper, as in this case. It was answered for the privateer, That the king's instructions bear no exception of his subjects, who should be more cautious than neuters, not to concur with his enemies; and the factors abroad ought to do the same that they would do if they were abroad: neither is there any loss to Sir Francis Clerk; for, if the factor pursue for the price of this wire, Sir Francis hath this good exception,—That through the factor's fault it was shipped in an unfree bottom, and thereby became prize. It was replied, That the price of the wire was not to pay, but was paid by provisions in the factor's hands when it was embarked. The Lords found, That the want of documents, or the like presumptive probation, is always elided by the contrary probation of property, in favours of the king's subjects residing in his dominions; and that, if they be ignorant of a latent interest of an enemy, not being upon the place of unloading, and have paid their factor *bona fide*, that their goods are free, and not to be prize. The Lords also found, That the privateer was only liable for such prices as he got for the wire, if he sold the same by virtue of the decreet of adjudication, before he was summoned by the reduction: otherwise, to be liable for the price as it was proven to be bought at Stockholm, such wire not having a known price here.

Vol. II, Page 240.

1674. *January* 6. JOHN HALYBURTON *against* JOHN WATSON.

JOHN Halyburton pursues John Watson and Grissel Ogilvie his spouse, for payment of a legacy of £5000, left by Henry Thomson to Cicill Thomson,

spouse to Halyburton. It was alleged, No process; because, by an Act of Sederunt in June 1672, All summonses are appointed to proceed upon twenty-one days' citation; and that no writer should insert any privilege, except the particular causes mentioned in the Act; whereof actions of executors against legators are none. It was answered, That the defenders live in Edinburgh; and there was a special privilege to cite parties in Edinburgh on twenty-four hours, which was neither mentioned nor taken off by the Act of Sederunt, and had been accustomed by the Lords since. It was replied, There was no exception, in the Act, of that privilege. The Lords found no process, but resolved to consider how far they would allow the privilege of citation within Edinburgh: whether only as to the second summons, this being the first summons; or when, by their own deliverance *in præsentia*, and not of course: But, having considered the Act the next day, they found it took not away the privilege of citation within Edinburgh, as to causes that, before that Act, were accustomed to be executed in Edinburgh, and that upon such time as was accustomed: And granted process.

Vol. II, Page 247.

1674. *February* 11. MITCHEL of DALGAIN *against* The EARL of DUMFREIS.

MITCHEL of Dalgain, having apprised the lands of Auchincross upon umquhile Auchincross his debt, and the Earl of Dumfreis having right to an apprising for the heir's debt in a competition betwixt them; it was alleged for Mitchel, That his apprising was to be preferred, by the late Act of Parliament preferring diligences upon the defunct's debt, to diligences done upon the heir's proper debt. It was answered, That the Act bears such diligences for the defunct's debts as are done within three years after his decease; as this apprising was not. It was replied, That there were not three *anni utiles* past after the defunct's death, before Mitchell's apprising; there being surcease of justice a great part of the time. The Lords found, That the Act could only extend to diligences done within three years after the defunct's death.

Vol. II, Page 265.

1674. *June* 12. The COMMISSIONERS of LINLITHGOWSHIRE *against* The HERITORS thereof.

SIR Walter Seatoun and James Dundass, having charged the heritors of Linlithgowshire for five pounds a-day for their commissioners' charges to Parliament, from the first day of Parliament to the last day thereof, conform to the late Act of Parliament; they suspend on these reasons:—1*mo*. That the Act bears expressly, "This allowance to be for the commissioner's attendance on the Parliament;" and, therefore, there is none due for such days and time as the commissioners were absent out of Edinburgh, or for such days as the Parliament sat and they were not present in Parliament. 2*do*. There can no more time be accounted than what the Parliament actually sat: but in recesses of Parliament, the chargers can have no allowance, unless they had been upon the Articles;

and none at all, when the Articles were not to sit, during the recess. It was answered, That the Act of Parliament, in the statutory part, gives this allowance, from the first day to the last day of Parliament, without any condition of being absent or present, which the Parliament can only quarrel; and there are no sederunts marked of Parliament, nor any thing in the Act relating thereto. The Lords found the reasons relevant thus, *viz.* That the days should be abated which the Commissioners were not in Edinburgh, or suburbs thereof, and so were not attending the Parliament; and for such recesses of Parliament that were of that endurance that the commissioners of Parliament could conveniently go home, do business, and return, according to the several distances of their dwelling, in which recesses the Articles were not to sit; but that they were to attend, if the Articles sat, to look to the interest of their shires, albeit they were not upon the Articles; and allowed no days to the commissioners for their coming to, or going from the Parliament, in respect of their near distance.

Vol. II, Page 271.

1674. *June* 23. Sir John Schaw *against* The Feuars of Pasley.

Sir John Schaw having charged certain feuars in Pasley, for their proportion of his charges, as commissioner to the Parliament, upon the Act of Parliament 1661, "Declaring all the vassals of the king and prince, whether the temporality or spirituality, to be liable to the charges of commissioners to Parliament;" which the feuars suspend, on this reason,—That the foresaid Act is derogated by a posterior Act, restoring the bishops to be the third estate; so that they represent the whole ecclesiastical estate: The Lords found, That the bishops did only represent their own vassals; and that the suspenders, being only vassals of the abbacy of Pasley, not belonging to any bishoprick, were liable for their proportion.

Vol. II, Page 274.

1674. *July* 16. The Town of Inverness *against* Forbes.

In the declarator at the instance of the feuars holding of the Town of Inverness, against the Town, decided the 14th day of July instant, it was particularly alleged against Cullodin, That he could not be declared free of the private stents of the Town, because the Town had obtained decreet against him, decerning him, "In all time coming, to be liable to the Town's stents, for their particular use, and that upon his own consent;" for the decreet bears, "that he was judicially present, and consented;" so that, being both a decreet of consent, and *in foro contradictorio* upon a full debate, it was sufficient against him. It was answered, That the said decreet was a decreet of suspension of a stent then imposed, extending to 35 merks; and, by the decreet, it appears that Cullodin consented only to the payment of the 35 merks; which in the dispute bears expressly, "Providing it were no preparative in time coming;" and bears, "That the Lords, of consent, found the letters orderly proceeded for 35 merks;"

and also the Lords declare, That Cullodin and the other feuars shall be liable for all necessary stents of the Town in time coming, being laid on in the method that they prescribed; and doth not repeat the consent as to that declaratory article; which, being *ultra petita*, and extrinsic to the process, cannot be instructed by the decreet itself, unless it were warranted by Cullodin's subscription; as was found in the case of the Laird of Buchanan against Lieutenant-colonel Osburn: for there was nothing in the process in time coming, but a charge for a particular stent; and there is a protestation, in the end of the decreet, against stents for the expenses of the Town's process, which shows the consent was not, as the decreet bears, "for all necessary private stents:" And, as to the decreet, in so far as it is a decreet *in foro*, it was very just that the Town, being in long possession of imposing private stents upon the feuars, should continue in that possession, until, *in judicio petitorio*, the feuars should liberate themselves by reduction or declarator, as now they have done: And there is nothing more ordinary than to repel, in a suspension, a reason founded upon the point of right, and even to find the letters orderly proceeded, for bygones, and in all time coming, *in possessorio*; which doth not clash with the contrary decreet by reduction or declarator *in petitorio*: as if any party being stopped in their possession of a high-way, should pursue the stopper, if the use of that highway for many years were proven, the Lords would decern the defender to desist from troubling the pursuer in that way in all time coming; and yet the defender might, in a declaratory action, instructing that there were neither constitution nor prescription of that way, be liberated from that servitude. And though, in the debate of this decreet of suspension, the Town mention their possession, and Cullodin his infeftment, *pro omni alio onere*, yet the Lords' interlocutor doth not express whether they proceed in the point of right or possession; and therefore the sentence must be understood *secundum naturam negotii*, not to be as to the point of right, there being then no declarator depending; but, as to the point of possession, that the Town might continue their possession of stenting, till the point of right were declared. It was replied, That the decreet was opponed, bearing to be of consent, which needed not to be repeated to every article; and that the protestation did confirm the consent, as to any other stents but those for expenses of process; and, however, it being a decreet *in foro*, decerning for all private stents in time coming, acquiesced in by the space of ten years, it could not be quarrelled of injustice, but behoved to stand as a perpetual rule. The Lords, having considered the whole decreet, found, That the consent was not adhibited to the whole articles in the sentence; and therefore did not sustain it as a decreet of consent, to exclude this declarator; and found, that, albeit it was *in foro*, being only in a suspension, it did not exclude the suspender's declarator of liberation.

Vol. II, Page 277.

1674. *July* 29. JOHN MITCHEL *against* TULLOS.

ROBERT Schaw, having apprised the lands of Lethingie from his brother Michael Schaw, dispones the same, for security of 5000 merks, to his sister Jean Schaw, Tullos her husband, and their heirs. Thereafter, John Mitchel, stabler,

appriseth the same lands from Robert Schaw: and, in competition betwixt Tullos and him for the maills and duties of the lands, it was alleged by Tullos, That he ought to be preferred; because Mitchel's apprising is null, as being deduced after the late Act of Parliament anent adjudications, discharging all apprisings thereafter; and, albeit there be an exception where lands were already apprised, and the legal not expired, yet that can only be understood of apprisings deduced against the same common debtor, or his heirs, being entered or charged: And, albeit there be here an expired apprising of the lands of Lethingie, led by Robert Schaw against Michael Schaw, whereby an apprising, after the said Act, against Michael, or against Robert, as heir to Michael, would be valid,—yet John Mitchel's apprising is only against Robert, *proprio nomine*, for Robert's own debt. It was answered, That the exception in the Act of Parliament is general; and that the reason of the exception must be, because, where apprisings are led, there cannot be an adjudication of a parcel of the land; the whole being affected by the apprising, and the right of reversion only remaining, which is not divisible; and that this, at least, being dubious, John Mitchel was *in bona fide* so to proceed, and should not lose his legal diligence; which can only give him the reversion, upon payment of 5000 merks, which he is willing to pay, in so far as Jean Schaw, who was fiar of the right, was not satisfied by her intromission with the rents of the lands, either after the right or before the same. It was replied, That Jean's intromission, before the right, cannot satisfy the same, it being only extrinsic, and no liquid compensation; nor can it be instantly verified, Jean being dead. The Lords sustained Mitchel's apprising, that he might have the benefit to purge Tullos's right, in so far as he was not satisfied, by intromission, by virtue of the right; but would not sustain prior intromission, not liquidated.

Vol. II, Page 281.

1674. *November* 26. CAPTAIN WISHART *against* The BISHOP of EDINBURGH.

THE Bishop of Edinburgh, Wishart, having died about Lammas 1671, his son pursues the present bishop for the quots of all testaments that were, or might have been confirmed, before his father's death, or within half a year after, by virtue of the ann. It was alleged for the defender, That the quots, being due for confirmation, could only be due to those that did confirm; and that they are no part of the yearly rent of the bishop, having a legal term; but are a part of the casuality due only for, and when confirmations of testaments are granted; in the same way as the duplications of feu-duties of vassals, or compositions for entering singular successors; so that the late bishop could have no right but as to what he actually confirmed, and so can have no ann of confirmations made after his death: as, if a commissary-clerk or fiscal had died after the bishop, but within the time of his annat, the bishop's executor could not pretend to the compositions granted by such officers. *2do.* There was no ann due to bishops before the late Act of Parliament *in anno* 1672, at which time Bishop Wishart was dead. It was answered, That the quots are the most considerable part of the bishop's revenue, and might have been set in tack, for a yearly duty, at the ordinary terms; and that the anns were due by an act of the bishops, upon a

commission granted by King James, produced in process; and that the said Act of Parliament did only alter the endurance of the ann,—that it could extend no further than a term's revenue after the incumbent's death; whereas, before, it might have reached a whole year, because, by the canon law, *annus inceptus habetur pro completo*. The Lords found, That the bishop had an ann, by virtue of King James's Act; but found he had no right to the quots of testaments but such as were actually confirmed or decerned; but did not determine whether those actually confirmed after his death, within the ann, would belong to him.

Vol. II, Page 286.

1674. *December 5.* CHARLES OLIPHANT *against* CURRIE.

CHARLES Oliphant, being infeft in some lands, by an apprising, pursues Provost Currie, and others, for maills and duties; who alleged, No process; because the second summons is only on three days, which should have been on six. It was answered, That, by the constant consuetude, all parties may be cited, being found within Edinburgh or the suburbs, on twenty-four hours; in which there was a late decision, produced at the instance of Sir James Cockburn against Lumsdane, who was cited in the Cannongate. It was replied, That the Lords, by their late Act of Sederunt, had declared the continuation of the diets of summons, without any exception of this privilege. The Lords, considering that there hath been such a custom even extended to those that were occasionally in Edinburgh, ordained an addition to be made to the Act of Sederunt, excepting citations within Edinburgh, and the contiguous suburbs; but only against the inhabitants there; for, as to strangers, who are not presumed to have their writs, or other probation, with them, they thought it just that the *legales inducie*, competent by law, should be free for them.

Vol. II, Page 289.

1675. *January* 18. The COLLECTOR of the KING and LORDS' TAXATION *against* THOMAS ENGLISH.

THOMAS English, younger of Straitoun, being apprehended, by caption, for payment of the rests of the taxations 1633; Thomas English, elder, his father, grants bond either to pay these taxations or to produce discharges, or otherwise the person of the said Thomas English, younger, betwixt and such a certain day. Being charged thereupon, he suspends, on this reason, That his bond is alternative, and thereby he hath his election, and is willing to produce his son, which is the third member of the alternative. The charger answered, That common rule in all alternatives, *electio est debitoris*, hath these limitations; 1*mo.* if there be not *mora*; but here the suspender's offer to produce his son is *post moram*, there being a determinate term and time appointed by the bond to produce him, which is long since past. 2*do.* Producing of the son is not receivable, *nisi rebus integris*, although it were at the term; but now the son is denuded of his estate, and doth pretend that he is free by his Majesty's proclamation re-

mitting taxations and other public dues, penal and arbitrary, or pecuniary mulcts: which proclamation, if it cannot free the son, he hath no other pretence to free him; and, if it would free him, as it cannot, the matter is not entire; for, if he had been produced at the day contained in the bond, which is long before that proclamation, when he had no defence, he would certainly have paid; and so can pretend no benefit of a subsequent proclamation. It was answered, That, albeit the bond contain a term to produce the son, yet it neither expresses the place, nor person in whose custody he should be put; and, therefore, as to these, it required a requisition of the charger, before which there could not be *mora*. *2do*. The suspender offers to produce his son solvent, and in as good condition as he was; and he might justly make use of his Majesty's proclamation supervenient. It was replied, That producing of him is not relevant, unless he renounce the benefit of the proclamation. *2do*. The proclamation excepts the case where bonds are granted, and excepts Duke Hamilton's right, who was not only general collector, but had an assignation from the King for satisfying of debt; and the King discharges only what belongs to himself, and not the taxations belonging to the Lords. The Lords found, That the producing of the suspender's son was not relevant, unless he renounced any proclamation after the term, whereby *res non est integra;* but did not dip in the proclamation.

Vol. II, Page 305.

1675. *January* 26. WILLIAM LOWRIE *against* SIR JOHN DRUMMOND.

WILLIAM Lowrie,—having adjudged the lands of Scotstoun to the behoof of Mr John Drummond, the apparent heir,—pursues Sir John Drummond for reduction of a disposition thereof, granted by Sir Robert Drummond *in lecto;* which being sustained, as to the onerous causes in the disposition, and an account thereupon, Sir John gave in an article of 800 pound due by Sir Robert, by bond, to Mr Robert Bruce. Against which it was alleged, That this sum could not burden Scotstoun, because Sir Robert Drummond, having disponed his lands of Meedhope to Sir John for 33,000 merks, having assigned him debts extending to 20,[000] and the disposition containing a reversion upon a rose-noble; it did also contain this clause, that it should be leisome to Sir Robert, or his lady, to leave 3000 merks farther in legacy to whom they pleased, which Sir John should pay, if there were no redemption. *Ita est*, Sir Robert, by his bond to Mr Robert Bruce, orders Sir John to pay the same out of the sums for which he is liable by the bargain betwixt them, at which time there was no bargain but Meedhope; and it could not be understood of the 33,000 merks, which were expressly destinated for several creditors' names in the contract; and so could only be understood as a part of the 3000 merks which Sir Robert had power to leave; and, according to Sir Robert's will, Sir John paid the sum before the right of Scotstoun, which was granted, *in lecto*, expressly for payment of Sir Robert's debts. It was answered, That the faculty granted to Sir Robert was only to leave in legacy; and this bond cannot be found a legacy; and Sir John, having obtained the disposition only burdened with a legacy, had this hazard, that, as it is ordinary to parties never to make testament, if Sir Robert

should omit the same, he was free. And it was found, in the case of the Creditors of Swintoun, that old Swintoun, having disponed his estate to his son, with power to affect the same with wadsets, and having borrowed sums expressly upon that clause, yet the same was not sustained against the donatar, because they were not wadsets *in forma specifica.* It was replied for the pursuer, That the disposition of Meedhope, being gratuitous only, with the burden of 13,000 merks, the faculty to legate is not to be interpreted strictly, as if the lands had been bought for a full price; in which case, the hazard of not legating might have been a motive to make the bargain: but Sir Robert's will to burden Sir John was the thing truly meaned; and though expressed under the name of legacy, because, *de jure*, legacies cannot burden heritage, Sir Robert's will, in his *liege poustie*, must be far more effectual. And, as to Swintoun's case, the reason why the creditors' personal bonds were excluded, was not because they were not *in forma specifica* contracted as wadsets, but because, being no real rights by infeftment, they could not burden the fee in prejudice of the donatar of the fiar's forefaulture. And the equivalent is no way alike, for a personal right is less than a wadset; but the will of any person in his *liege poustie inter vivos*, is more than a legacy. And, albeit Sir John, who paid this sum, took assignation, he could not therewith have distressed Sir Robert; seeing he could not have excepted upon the 3000 merks, whereof he had power to legate, or otherwise he could have redeemed for a rose-noble; and so, seeing Sir Robert could not have been effectually burdened, neither can his heir, or his other estate. The Lords found, That Sir Robert Drummond's will, being expressed by this bond, to relate to Meedhope, and could be attributed to nothing but the faculty to legate; that the same was sufficient to burden that estate, though not in the form of legacy.

Vol. II, Page 309.

1675. *January* 26. HECTOR M'KENZIE *against* GRANT.

ALEXANDER M'Kenzie, having obtained a decreet of registration against Grant of Glenmoristoun, as representing his father upon the passive titles, Hector, as heir to Alexander, pursues transference. The defender alleged Absolvitor; because the decreet of registration is null, in so far as it bears, That the defender was holden as confessed, being lawfully summoned; and doth bear, By a messenger-at-arms, personally apprehended; and therefore is null; because no party is ever holden as confessed upon another citation: and, therefore, decreets do still bear, that parties were holden as confessed, *because* they were lawfully summoned by a messenger-at-arms, "personally apprehended." It was answered, Though it useth to be expressed, and, being quarrelled *de recenti*, might be a ground to recal or reduce the decreet, when the executions would be found to instruct whether it was personally by a messenger or not, yet the decreet of registration being obtained *in anno* 1648, and never quarrelled till now, that there is a reduction raised; the same cannot be found null; because, *in actis judicialibus, omnia presumuntur sollenniter acta.* And, in this decreet, the defender was compearing: and it cannot be presumed that the defender's advocate would have suffered him to have been holden as confessed, if

the citation had not been truly given, personally, by a messenger; which being obvious, and omitted, the decreet, after so long a time, cannot thereupon be annulled. The Lords sustained the decreet, unless the defender, upon his reduction, would offer positively to prove, by the executions, that the citation was not by a messenger personally.

Vol. II, Page 310.

1675. *January* 29. Sir James Stamfield *against* The Executors of the Duke of Lennox.

Sir James Stamfield and his partners having pursued adjudication of a ship, before the admiral, he did declare the same prize; whereupon the tenth part of the value was paid to the admiral, and the fifteenth to the king: but thereafter, the Lords having reduced the admiral's decreet, and freed the ship; the privateer having craved deduction of the tenth and fifteenth parts, which he had paid, by virtue of a standing decreet for the time,—the Lords allowed the same, reserving action against the admiral for the tenths, and application to the Exchequer for the fifteenths: upon which application the Exchequer did repay, to the stranger, the fifteenths. And now Sir James Stamfield pursues the executors of the Duke of Lennox for the tenths; who alleged Absolvitor; because the tenths being the honorary or salary due to the admiral, albeit his decreet was reduced, he was not liable for repetition, more than inferior judges are liable for sentence-silver, which is the twentieth part; especially, seeing there was neither fault nor fraud found in the admiral, whose decreet was reduced upon other grounds and considerations than were moved before the admiral: nor could it be pretended that the tenths were paid *causa data et non secuta*; because the true cause was not the confiscation of the ship, but the sentence of the admiral, which followed. It was answered, That the tenths of prizes are a casualty due to the admiral by the privateer's commissions and custom, when prizes are declared; but not for the salary of the Judge of Admiralty, whose pains are alike when ships are freed as when they are adjudged; but it is a part of the profit of the war against enemies, which the king reserves from the private men-of-war, in the same way as the king's own fifteenth part is. The Lords repelled the defence; and found the defenders liable for repetition of the tenths.

Vol. II, Page 313.

1675. *February* 9. Mr Lewis Dunlop, Minister of Skeen, *against* The Heritors thereof.

In anno 1648 there was a decreet of locality of the kirk of Skeen, in which a part of the tack-duty due to the parson of Kinkell (which parsonage is annexed to the Deanery of St Andrew's,) was allocated to the minister, and hath been so possessed till now. This minister pursues the heritors for the local stipend; a part whereof is the vicarage. They allege, 1*mo*. That they are not liable to the minister; because, by the Act of Restitution of Bishops, they and their deans

are restored to all rights and possessions they had *in anno* 1637, when they were expulsed: so that the heritors are liable to the dean of St Andrew's; and the minister must apply himself to the commission for a new locality. It was answered, That, albeit the Act of Restitution would exclude the minister's interest as to the tack-duty due to the dean, yet that Act cannot be extended to the benefit of a possessory judgment, or *decennalis* or *triennalis possessor*, attained by the minister after the Act of Parliament; so that he, having bruiked seven, ten, or more years after the Act of Restitution, by virtue of his presentation and decreet of locality, he is preferable *in hoc judicio possessorio*, till, *in petitorio*, the dean reduce the minister's right, or declare his own: and here the Dean concurs, and alleges, There is sufficient free teind in the parish, both to give the dean his full tack-duty, and likewise the minister his whole stipend. The Lords found the allegeance for the minister, of seven years since the restitution, relevant *in possessorio;* but did not prefer both the dean and minister, upon sufficiency of teind, which is only competent to the commission for plantations.

Vol. II, Page 320.

1675. *February* 18. JOHN DAIKELL *against* DAVID HUME.

JOHN Daikell, merchant in London, having charged David Hume for payment of £20 sterling, due to him by bond, granted by the late Earl of Hume, as principal, and him as cautioner, whereupon he had obtained decreet of suspension; the said David suspended, the second time, on this reason,—That this bond being granted in England, to a merchant there, the Earl of Hume was incarcerated, or arrested in prison, upon this very bond; and, before he was liberated, (being under the guard of his keeper,) he died: and, by the law of England, the principal debtor so dying in prison extinguisheth the debt, and there can be no farther satisfaction thereof. It was answered, That the decreet of suspension *in foro* is opponed, wherein this was proponed and repelled; and so is not now receivable. It was replied, That the decreet bears it was repelled, in respect it was not eiked nor libelled; yet, upon consigning of £12, the same was receivable; and, *medio tempore*, it was unwarrantably extracted shortly thereafter. The Lords reponed the suspender, upon consignation of the £12, and paying the expenses of the decreet of suspension; and sustained the reason of suspension, to be proven by the judgment of the Judges of the Common Pleas in England, by the mouth of the Chief Justice.

Vol. II, Page 324.

1675. *February* 23. The MARQUIS of DOUGLAS *against* WILLIAM SOMERVEL.

THIS cause being debated upon the 23d day of December last, the Marquis further insisted, upon this ground:—That William Somervel could not defend himself with the rental of the lands in question; because, after the rental, his father had taken a feu-right of the same lands, in favours of his son, to whom he had formerly procured the rental: which feu, as being a more noble and incom-

patible right, did absorb and extinguish the rental; and which feu, being delivered up to the marquis, and past from,—all right in that feuar's person is thereby extinct. It was answered, That, albeit a rental and a feu cannot both have effect at the same time, yet they may consist as cumulative securities,—the one, failing the other, to subsist; so that the possessor may defend himself with either; and, if either should be reduced, the other would remain as the effectual right: and, therefore, the giving up, or renouncing the feu, to the marquis, doth only evacuate the same, but doth not take away the rental, which was anterior thereto; and no renunciation can be further extended than to what is expressed, unless it were for an equivalent onerous cause, with absolute warrandice. It was replied for the pursuer, That the giving up of the evidents of the feu by the father, who acquired both rights for his son, an infant, and for onerous causes, doth import absolute warrandice; and must be presumed to renounce all rights, unless the rental had been expressly reserved. The Lords ordained the pursuer to condescend how and when the evidents of feu were delivered up; and to examine the communers and witnesses thereanent, that it might appear *quid agebatur;* whether to quit all right, or only the feu-right.

Vol. II, Page 325.

1675. *February* 23. NASMITH *against* SMITH.

NASMITH pursues Smith, as behaving as heir to his brother by intromission with the rents of the lands wherein his brother died infeft, for payment of a debt of his brother. The defender alleged Absolvitor, because his brother was never lawfully infeft; in so far as he was infeft by the usurpers, in place of the Duchess of Hamiltoun, being then forefault; whereas the true superior was Colonel Inglisbie, by a gift from the usurpers; and all these being void after the king's return, the defender infeft himself as heir to his father, and so did not represent his brother. The pursuer answered, That the defender, having entered in possession after his brother's death, did enter in his brother's possession; which he could not introvert, though there had been defects in his brother's infeftment; who, having been publicly infeft, and in possession, and, upon the confidence thereof, having contracted debts with several creditors, the defender could not summarily pass by his brother's right and enter as heir to his father; but ought first to have raised reduction or declarator of the nullity of his brother's infeftment, and called his creditors thereto; for, if such courses be sustained, it lays a patent way to deceive all creditors contracting *bona fide* with the fiar for the time, by entering to a former predecessor, and abstracting and quarrelling the last fiar's right. The defender replied, That behaving as heir is always with presumption of *animus immiscendi;* which cannot be in this case, for the defender shows he had no mind to meddle with his brother's heritage; and that he would not enter heir to him, but to his father. The Lords ordained the defence, as to Inglisbie's right of superiority, to be first proven; reserving to themselves,—if it should be proven how far the defender should be liable, in regard of his brother's infeftment,—whether for the duties intromitted with by him, before his brother's right were found null, yea or not.

Vol. II, Page 326.

1675. *June* 16. Mr William Gray *against* The Laird of Cockburn.

The Laird of Cockburn being debtor for 50 bolls of corn, and 50 bolls of oats, to Mr William Gray, Parson of Dunse, as a part of his stipend,—Cockburn required him, by instrument, to receive the oats upon Candlemas day: Eleven days after, the minister required a servant of Cockburn's, by instrument, to deliver the oats, and did obtain a decreet before the Sheriff for the Lammas fiars. Cockburn suspends; and raises reduction on these reasons,—That he could be only liable to the Candlemas fiar, because he had made an offer *debito tempore*. The charger answered, That it was not *debito tempore*, because payment ought to have been made between Yule and Candlemas, and so not upon Candlemas day. *2do*. Though payment then might have liberated, yet an offer that day was not sufficient, because an offer necessarily implies such time as the person to whom it is made may befit himself and be in readiness. *3tio*. Albeit an offer of money obliges to a present receipt, yet an offer of victual must allow a time for having ready horse and sacks to receive it; and, though it cannot all be received and carried off in one day, it imports no failyie or prejudice; but that the person to whom such a captious offer is made, is in the same case as if no offer had been made; as was in this case, in which there was a great storm the time of the offer. The suspender replied, That the offer was sufficient, and not captious; because the charger was not taken unawares, but when he was receiving his bear the same day; and, if he had accepted the offer, and begun to receive a part that day, and continued so soon as he could receive and carry off the victual, it might have imported a receipt; but having said nothing then till eleven days after, when the victual, or a great part thereof, was disposed upon, it was his own fault; and so he can only demand the Candlemas fiars, whereas the dearth raised the price of the Lammas fiars to the double. The Lords found, That payment might have been made upon Candlemas day; but that the offer being made upon that day, required some time for the receipt of so much victual; which neither being demanded nor refused, they modified the price to eight merks, being near the middle betwixt two fiars.

Vol. II, Page 329.

1675. *June* 17. Robert Paterson *against* The Town of Aberdene.

Master Robert Paterson,—being elected bibliothecar for the College of Aberdene, by virtue of a mortification by Doctor Reid, whereby he left his books to the College, and mortified 600 merks yearly to a bibliothecar, accountable to the College and Town,—pursues a declarator of his right as bibliothecar, being elected by the College; and that Mr William Alexander, presented by the Town, had no right. The Town alleged, No process; because Doctor Reid's mortification, or principal testament, was not produced, but an extract out of the register of the commissariat of Aberdene, which is null, because the Doctor, having died out of the country, *animo remanendi*, the confirmation should have been at Edinburgh; and, being at Aberdene, is *a non suo judice*, and so null. *2do*. The mortification

mentions the bibliothecar to be accountable to the Town, and them to employ the Doctor's money for purchasing this rent; which imports them to be patrons, whereof they have been in possession by presenting several bibliothecars; and, by a contract with the first bibliothecar, named by Doctor Reid, they are acknowledged as patron, wherein the principal of the College is subscribing witness. It was answered, That the confirmation being a legal sentence, it is not null, whatever may be the interest of the commissary in the quots or confirmation; and, that the mortification being without any mention of patronage, it gives the College a free election; and the subscribing of the principal, as witness, imports nothing. The Lords repelled the defences, and found, That the College had the free power of election, without any patronage.

Vol. II, Page 330.

1675. *July* 9. Sir John Cheislie *against* The Laird of Walstoun.

Sir John Cheislie having raised a cognition, before the Sheriff of Lanerk, against ——— Baillie of Walstoun, for clearing his right of property or commonty to a piece of marsh ground lying upon their march; Walstoun did raise another cognition before the said Sheriff, by way of re-convention. Upon both which processes an inquest of fifteen were chosen, and the parties did cast lots for the odd man, which befel to Walstoun; so he choiced eight, and Sir John Cheislie seven. There were three witnesses examined for either party, and two common witnesses. The testimonies being perused by the inquest, six voted that it was proven Sir John had commonty in the piece of ground controverted; Eight were not liquid; and the chancellor of the inquest voted not, nor returned any verdict. Whereupon Sir John Cheislie gave in a bill of advocation to the Lords, desiring that they would either declare, that, where six of the inquest voted for commonty, and eight were not liquid, that the inquest and Sheriff ought to proceed to determine commonty; or otherwise, that the Lords would advocate the cause, and determine the probation themselves. Walstoun, having desired to be heard upon this bill, he alleged, That the progress of the cognition being as aforesaid, the same was null, and there would be no further process thereupon; but he had a declarator of property of the ground in question depending, which would determine the whole matter, both as to right and possession; and in which he was content Sir John Cheislie should have a joint probation, upon which the testimonies of the witnesses taken might be renewed. *2do.* Whatever were to be done upon either process, he ought to have more witnesses. The Lords advocated the cause upon the bill; and ordained the process and testimonies taken before the inquest, to be produced, to be advised by the Lords; at the advising whereof they would hear the parties, whether there were any further witnesses to be used.

Vol. II, Page 342.

1675. *July* 22. John Brown *against* George Herriot.

John Brown pursues a reduction of a decreet-arbitral betwixt him and George

Herriot, in which pursuit he had formerly alleged, That the arbiters had proceeded most unjustly, because they refused to show him the claim given in against him; and he, having produced grounds of a full compensation, they rejected the same, and ordained him to pay £1000. This was found relevant to be proven by the arbiter's oath. But now he alleges, That he, being in a reduction, the defender must produce the grounds and warrants of the decreet-arbitral, particularly the claim. The Lords found no necessity to produce the claims, which were not preserved nor noticed after decreet; as in the case of a Judge-ordinary having a record.

Vol. II, Page 358.

1675. *November* 19. The ELEEMOSYNER of the POOR of LINLITHGOW *against* KENNOWAY and COCKBURN.

THE Eleemosyner of the Poor of Linlithgow having a bond granted to him, for the poors' behoof, by Whitehead of Park, and having used horning and caption thereupon,—Piltoun and Lenie interpose, and agree with the eleemosyner that he should give an assignation to them of the bond, horning, and caption; and that they should give him a new bond, wherein they should be obliged conjunctly and severally, and that the writ should be put in the hands of Kennoway till they were interchanged. Accordingly, the assignation was subscribed by the eleemosyner, and delivered to Kennoway with the old bond, horning, and caption. Piltoun subscribes the new bond, which was also in the hand of Kennoway. Lenie promised to subscribe, but did not. Whereupon Piltoun prohibited Kennoway to deliver up his bond till Lenie subscribed: and therefore Kennoway refused to deliver up the bond to the eleemosyner; who, having pursued Kennoway to deliver, and referring to his oath that he had the said new bond in favours of the eleemosyner subscribed by Piltoun, and delivered to Kennoway for the poors' use, to be given to their eleemosyner,—Kennoway did depone, and the substance of his deposition was according to the deduction foresaid. At the advising of the oath, Piltoun appears, and alleges, That it is clear, by the oath, that the agreement was, that Piltoun and Lenie should both be bound conjunctly and severally, and that he had expressly prohibited Kennoway to deliver up his bond till Lenie had subscribed; and, if the bond should be given up, it might be made use of against him for the whole sum, without having relief of Lenie. It was answered, No respect to Piltoun's prohibition, because it was after the agreement and his subscription: so that the writ, being subscribed and delivered to Kennoway without any such prohibition, to be given up to the poor; as to Piltoun, it was a delivered evident; and it was his own fault that he subscribed before he saw Lenie subscribe with him. The Lords found, That the bond ought to be delivered up to the eleemosyner, and the assignation of the old bond to Piltoun; but declared, That Piltoun should be only liable for the one half of the sum in the new bond, as he hath only right to the one half of the old bond by the assignation to Lenie and him; and that he had no interest to stop the delivery of the bond upon Lenie's not subscribing, seeing there was no alteration as to him thereby.

Vol. II, Page 371.

1675. *November* 20. WARDEN, Supplicant.

——— Warden, having given in a supplication for loosing of an arrestment laid on by one Barry upon a decreet, upon this reason, That albeit, ordinarily, that arrestments laid on upon decreets are not loosable upon caution, yet here the decreet was suspended before laying on of the arrestment; by which it became not to be a liquid sentence, but became a dependence. Which the Lords sustained; and the arrestment to be loosed upon caution.

Vol. II, Page 372.

1675. *December* 3. ROBERT ARBUTHNOT *against* HENRY BARCLAY.

ROBERT Arbuthnot pursues declarator of the escheat and liferent of Colonel Henry Barclay; in which pursuit this defence was found relevant, That the Colonel was relaxed, within the year, at the head burgh of the shire where he dwells, and the relaxation registrate. The act being called in the Outer-house, and the term craved to be circumduced, the Colonel produced a relaxation at the cross of Edinburgh, registrate there, and another relaxation at the cross of Mernes, where he dwells, but not registrate there. The pursuer alleged, That this production could not stop certification, because it satisfied not the desire of the act, requiring a relaxation at the cross where the defender dwelt, duly registrate. The defender answered, That he produced writs *ad modum probationis*, and referred the same to be advised by the Lords, whether proven or not proven; which could only be done *in præsentia*, and not in the Outer-house. The pursuer replied, That, albeit the sufficiency of the probation was only competent to the whole Lords, where there could any doubt arise, yet, as in other cases, so in this, where the matter was clear, the Ordinary might determine; otherwise the production of any writ, though nothing relating to the matter in question, would stop the circumduction of all acts probable by writ, and put them to the delay of coming in by the roll of concluded causes, to their great delay and detriment. The defender duplied, That it was free for him to debate *in præsentia*, whether he had proven sufficiently *ad victoriam causæ*, though not all that the act required. And here he would instruct, that he had proven sufficiently, because he had produced his relaxation, to the keeper of the register, *debito tempore*, which behoved to supply the registration; in which case the Ordinary could not judge. The Lords found, That writs not relative to the matters in question could not stop the certification; but that thir writs, relating to the matter contained in the act, and having any doubtfulness, behoved to stop the certification, and come in as a concluded cause.

Vol. II, Page 374.

1675. *December* 10. GEORGE KEITH *against* DAVID MURRAY.

GEORGE Keith pursues David Murray for wrongous intromission with fifty-

nine barrels of salt, left in the custody and cellars of Patrick Trail, in Kirkwall, by Captain Keith, and by him disponed to the pursuer. The defender alleged Absolvitor; because he, being collector of the customs in Orkney, had warrantably seized upon this salt, because there was no entry made of the ship that imported it.

It was ANSWERED, That the pursuer's author was *in bona fide* to buy the salt, seeing bulk was broken, and parcels sold to the defender himself, and many others.

It was REPLIED, That it is not the breaking of the bulk, but the not making of entry before bulk broken, that warrants the collectors to make seizure; neither did the defender give warrant to break bulk; but, on the contrary, offers him to prove, that, he being in Zetland, and the ship coming there, being in distress for want of vivers, and having no money to buy, and there being there no port to enter, did consent for the sale of ten barrels of salt, for the company's necessity, and sent a certificate to the customers at Kirkwall, that, accordingly, entry might be made there; which not being made, he did warrantably seize upon the salt in question.

Which the Lords found relevant.

Vol. II, Page 379.

1675. *December* 15. The WRIGHTS and MASONS of EDINBURGH *against* The COOPERS, BOWERS, GLAZIERS, SLATERS, PAINTERS, PLUMBERS, and WHEELWRIGHTS of EDINBURGH.

THE wrights and masons of Edinburgh came to join in one society, upon occasion of an altar dedicated to St John, in the kirk of St Giles, for the light thereof, and other expenses thereanent, wherein they did concur in contributing; and thereafter have to this day continued in one incorporation; and had granted them, by the council of Edinburgh, power to make orders for ruling their trades, which are confirmed by King James the Fifth, King James the Sixth, and by King Charles the First and Second. There were also like privileges granted to the coopers; and they, the bowers, glaziers, and slaters, have been associated with the wrights and masons; and all of them have voted in concerns of all these trades, from the year 1572, as appears by their books, beginning that year, and continuing till now: but there is nothing else to show the time or terms of their incorporation; and particularly the admission of their masters of the several trades, their box-master that keeps the money of their whole society, or in the election of deacons, of wrights and masons preceding in the first place, and other trades subsequent. *In anno* 1583, there being a difference betwixt the merchants of Edinburgh on the one part, and the trades on the other, anent their interests in the magistracy, they both submitted to the arbitrament of King James the Sixth, who, with advice of some of the statesmen and lawyers for the time, gave his decreet-arbitral, commonly called *the sett*; by which he determines,—That there shall be only fourteen crafts who shall have power to choose deacons, *viz.* wrights, masons, &c.; of which deacons, eight shall be upon the ordinary council, and the whole fourteen in matters of special importance, expressed in the sett; and, for the annual election of these deacons, the council

are to give to the crafts a leet of three persons, out of which they are to choose their deacons.—The wrights and masons, and the other trades of their fraternity, have jointly chosen their two deacons, which are called the deacons of wrights and masons; and, *in anno* 1665, one of the other trades was leeted by the council, and another *in anno* 1673; and, after the leet was voted, the deacons of wrights and masons, when they presented their deacons to the council, protested against the leeting of any but wrights and masons. *In anno* 1611, there is a decreet-arbitral in the books of the deacon-convener, in the Magdalen Chapel, bearing a reference between the wrights, masons, bowers, slaters, and others, on the one part, and the coopers on the other, to the twelve deacons of the remanent trades; who do determine, That the coopers are a part of the corporation of the wrights and masons, and are not only pendicles thereof; and that they have equal interest with the wrights and masons to be elected deacons. But in the books of wrights and masons there is no mention of this reference or decreet. There are now mutual declarators at the instance of the coopers, bowers, &c. against the wrights and masons, that they have right to be elected deacons of the wrights and masons, and their whole incorporation;—and, at the instance of the wrights and masons, that they have no right to be elected deacons.

It was ALLEGED for the coopers, &c.—That it being notour and acknowledged that there was an incorporation of the wrights, masons, coopers, bowers, &c. past memory of man; having a common and equal vote in all the interests of the several trades, and particularly in the election of deacons; as appears by their books; that therefore they were eligible to be deacons of these trades; for, in all associations, law presumeth equality, unless an unequality or special privilege, by paction, law, or custom, appear in the contrary: and, more particularly, law presumeth that all that do elect may be elected, unless an incapacity appear in the contrary; but here it is acknowledged that all these trades are incorporate in one society, and always have voted the deacons; and, therefore, any of them may be chosen.

It was ANSWERED, 1*mo*. That, in all privileges and free donations, nothing is presumable but what is proven; and here it is evident that privileges were granted to wrights and masons, all one at first, which, being communicated to their inferior trades, can be extended no farther than what they have by concession from them, or by long possession thereof; but they cannot subsume that ever they were elected deacons, or that ever they were given out in leet to be elected, but twice of late, when there was division and faction in the town. 2*do*. Though the incorporation might import a communication of all interests, yet that presumption is taken off by the King's decreet-arbitral; who determines, That none shall be elected deacons but they that are expert in their crafts; and that there shall be only fourteen crafts having power to choose deacons, whereof wrights and masons are two. And decreets-arbitral, being *stricti juris*, are to be interpreted literally; especially being done by a king, and so wise a king, with assistance of such able persons. And it were of dangerous consequence, upon interpretation, to unhinge that settlement against the literal sense thereof; for there can be nothing more clear than that two of the fourteen deacons must be the deacons of the wrights and masons, and expert in their own trade, and that among the fourteen trades the masons and wrights are two. And it is obvious to common sense, that a painter, plumber, a glazier, &c. is

neither wrights nor masons: And if the king had meant that these names should have comprehended other trades, he would certainly have added, "and their adherents." Yea, though the decreet-arbitral were not so clear, the nature of the thing imports that a deacon should be skilful in the chief workmanship that he is to oversee. And in heterogeneous societies there is not presumed an equality; but the nature of the privilege may exclude many members of the society; as when, in universities, a rector is to be chosen, scholars may vote and elect, but are not capable to be elected, because the dignity is not quadrant to their capacity. Even so, here, a painter or plumber can be neither thought capable to have inspection of the workmanship of wrights and masons; and, therefore, custom hath cleared the case, that these were never leeted to be deacons of the wrights and masons, but twice, and undesignedly.

It was REPLIED, That nothing alleged doth contradict that principle, that in societies all are presumed equal, except the contrary appear; and that all who elect may be elected, unless, by some specialty, they be rendered incapable: so that, though donations are not to be extended, yet, when they are granted, all particulars need not be expressed; but what is implied is granted, unless it be excepted. So that all the question is here, Whether there be any specialty to exclude these trades to be deacons appointed for oversight of the workmanship of the whole incorporation. And it is evident that there is none *ex natura rei;* because a painter or plumber is as able, and more able, to have the inspection of the workmanship of a wright or mason, than they are to have inspection of painting and plumbing. But the books of this incorporation make it evident, that all these incorporated trades do vote in the essays and sufficiencies of the masters which are entered to every trade; so that the deacons of this incorporation, whoever they be, may, and sometimes must, take the assistance of other masters in the corporation, in relation to the workmanship of the several trades. Nor are any, nor all of them, supreme judges; but are controllable by the magistrates of the burgh, though they be of none of the trades, who do take the advice of others skilled and unsuspected persons. And there is none contending that a slater or a plumber is a mason or a wright; but only, that they may be deacons, to oversee the masons and wrights, as well as they may oversee them. And as to the sett, there was nothing under the view and consideration of the King as to the difference of trades among themselves, or otherwise he would more clearly expressed the matter of deaconry. But seeing, before the King's decreet, there was an incorporation of the wrights and masons, and others of their fraternity, who used to elect deacons; and recent custom presumeth ancient; so that we have no ground to doubt but the election was then as now. For, albeit the King names a deacon of the wrights and a deacon of the masons; so that, if his meaning had been, that these two trades should elect their respective deacons, they behoved to have dissolved their former society and manner of election, and to have elected their deacons severally; yet they did make no alteration, but did elect unitely; wrights voting to the election of the deacons of masons,—and they to the wrights,—and the other trades to both: which clearly evinceth, that there was nothing intended nor acted to alter the capacity and way of election of deacons, but only to balance them with a proportionable number of merchants. So that, by fourteen trades, it cannot be understood that they were fourteen single homogeneous trades, but fourteen incorporations of tradesmen, as then they were; each incorporation having one

deacon; and the masons and wrights being united in one incorporation, because of their considerableness, having two deacons: or otherwise, as the other trades were excluded from being deacons by the sett, they behoved to be turned out of doors, and have no vote in the election, as not being of the craft of wrights and masons; and so have ceased to be a part of the incorporation of the city of Edinburgh, consisting of merchants and trades: and thus had all the other trades, which are not specifically named, been turned out, and the town been capable of no other trades than what actually then were, to the great detriment both of the chief city and country. But it is evident that they both retained the other trades incorporated which then were, and assumed others, as they were most congenerous to these fourteen incorporations; as the waulkers assumed the hat-makers; and the furriers the glovers; who both have been frequently deacons of these trades. And it is as heterogeneous to say that a belt-maker is a hammerman, who hath all along continued in that craft as such, and may be deacon of it, as that a slater may be comprehended under the craft of masons.

The Lords, having considered the whole matter, they found, by their books produced, that the coopers, bowers, glaziers, wrights, and slaters, were incorporated in fraternity with the wrights and masons, and did vote in all their concerns and interests; and nothing appeared of any limitation in their admission, or any incapacity to be deacons of the whole incorporation; and found, that the King's decreet-arbitral, by designing fourteen crafts, by the naming of the chief craft, did not exclude the rest that were incorporated with them, nor alter their capacity of electing and being elected deacons: and therefore found, that the council might put any of these trades in the leet, and they might be chosen deacons accordingly. But, as for the painters, &c. that came in after, they appointed the parties to be heard, whether they had the like capacity or not.

Vol. II, Page 382.

1676. *January* 11. WILLIAM BRUCE *against* JAMES ALEXANDER.

JAMES Alexander having granted a bond to his daughter Janet Alexander, and being charged thereupon, suspends on this reason; That it was never a delivered evident, but was unwarrantably intromitted with by his daughter, being in a locked box of his, which she broke up; at least being in a coffer or trunk of his whereof she had got the keys, being in his family for the time; and, that she had left his family and married, without his consent, to William Bruce. All which he referred to her oath; at least craved her oath of calumny, and that witnesses, *ex officio*, might be examined how she came by the bond.

It was ANSWERED; That the bond, being moveable, did now belong to William Bruce, her husband, *jure mariti*, which is a legal assignation; and so his wife, as cedent, cannot depone in his prejudice; neither can her oath of calumny be admitted, for the same reason: But he is willing to depone that he got the bond from his wife, before the marriage, as her portion, and knew nothing of any unwarrantable way of coming to it. Neither did she marry without her father's consent or approbation; for he agreed to the marriage; and, by a minute of contract, which was drawn up by his warrant, was to have disponed his

land, which was provided to heirs-male, in contemplation of this marriage; but, having differed in some provisions, it was not subscribed; and, after the marriage, the said William and his spouse were entertained in the family with the father. And therefore, there was no reason to prove the intromitting with the bond, by witnesses, *ex officio*, or otherwise.

The Lords allowed witnesses, *ex officio*, to be examined, how the bonds came in the hands of the said Janet Alexander; in respect of that evidence, that she had left the family, and married without consent of her father, and that there was a draught of the minute of contract on other terms, without mention of this bond; but did not grant the oath, either of calumny, or verity of the wife.

Vol. II, Page 396.

1676. *January* 19. ——— ———, in Argile, Supplicant.

——— ———, in Argile, being executor nominate to a defunct; he gave in a bill to the Lords, representing, that the commissary of Argile, being with the M'Leans, there were letters of intercommuning published against him, and he did not officiate in his office as commissary, and hath no power of deputation, there being no Bishop of Argile; and, therefore, desired that he might have warrant to intromit with the defunct's moveables, and licence to pursue, from the Lords, as being the King's great consistory, and having authority to supply the defects of inferior courts.

Which desire the Lords granted.

Vol. II, Page 403.

1676. *January* 26. DUKE of LAUDERDALE *against* LORD and LADY YESTER.

THE Duke of Lauderdale having disponed his whole estate to his daughter, the Lady Yester, by a disposition before her marriage, and also by her contract of marriage, both containing a reversion upon a rose-noble, by himself, or the heirs-male of his body, he used an order, and obtained declarator *in foro*; and, having charged my Lord and Lady Yester to renounce and resign accordingly, he offered a draught, which he required to be subscribed for implement. They gave in a bill of suspension upon obedience; and therewith subscribed a renunciation and resignation.

The Lords, having appointed the suspension to be discussed upon the bill, as they do ordinarily, whenever the charger requires it, the charger having produced the draught as his special charge,—it was ALLEGED for the suspenders,—That they offering a subscribed renunciation for obedience, they were not obliged to object against the charger's draught; but their reason was unquestionably relevant, and instructed by the renunciation produced, unless the charger could object against it.

It was ANSWERED,—That, in a matter of this importance, of the Duke's whole estate, he was not obliged to accept of a renunciation, unless it were subscribed before such persons as he would desire to be present; that there might be no

question of the truth of the subscription, by the witnesses disowning the same: so that this renunciation, being only to be considered as an unsubscribed draught, and two draughts being offered, the charger was ever allowed to make his own special charge.

Which the Lords sustained; and allowed the suspenders to object.

The suspenders OBJECTED, That, by the charger's draught, the Lord Yester was required, not only to consent to his lady's renunciation, who is fiar, but to take burden for her; which, though oft-times it be in writs of consent, yet, without express consent, the husband is not obliged to take burden for his wife; whereby he would become surety for all her deeds prejudicial to the renunciation, though they were done after his death.

It was ANSWERED, That the clause of taking burden, being ordinary, ought to be inserted; and, that the charger was willing that it should be declared, that it should import no more but the authorising my lady, as her husband.

The Lords ordained the clause to be thus expressed:—"That my lady, who is fiar, should renounce and resign, with consent of my lord, as husband, authorising her; and he, for himself, for any right he hath by the disposition or contract.

Vol. II, Page 404.

1676. *January* 26. SIR ROBERT DRUMMOND *against* LAWRIE of BLACKWOOD and GEORGE HAMILTON.

SIR Robert Drummond disponed his estate of Meidhope to Sir John Drummond for 33,000 merks, and assigned him to sums extending to 20,000 merks, redeemable in his own time only, and bearing this clause,—"That if the right should become irredeemable, Sir John should be obliged to pay 3000 merks to any person Sir Robert, or his lady should leave the same to in legacy, the estate being freed of debts and burdens." Sir Robert assigned this sum of 3000 merks to his lady, and she transfers the same to George Hamilton; Sir John having given in several debts to affect the lands of Scotstoun, disponed by Sir Robert, to him, upon deathbed.

It was ALLEGED by Lawrie of Blackwood, who had adjudged the interest of Sir Robert's apparent heir, in the lands of Scotstoun, That Sir John behoved to deduce the 3000 merks which Sir Robert had power to legate; and had exercised the faculty by this assignation.

It was ANSWERED for George Hamilton, That he had the only right to this 3000 merks; for, albeit it be provided, That Sir Robert may leave it in legacy, which imports, that he may do it in testament, or on deathbed, yet, he is the fiar of the sum; and might dispose of it by assignation, as he hath done. And as to the creditors, they neither have, nor can affect this sum, before it was transmitted from Sir Robert, by his assignation; but seeing, Sir John, who hath right to all the debts, and had his option to insist against Sir Robert's estate, real or personal, but hath affected Scotstoun therewith, he cannot be forced to quarrel Sir Robert's assignation; nor hath he any ground to quarrel the same; Sir Robert's whole debts being satisfied otherwise, and he no bankrupt nor insolvent. And albeit the assignation were on deathbed, yet, by the conception of the clause, "that it might have been by way of legacy," it is sufficient: and the

apparent heir, to whose behoof Blackwood hath adjudged, would be obliged to warrant Sir Robert's assignation.

It was REPLIED, That the assignation, being upon deathbed, is, in effect, a legacy, which can never take effect but *deductis debitis*.

The Lords found, That Hamilton had the best right to the sum, by Sir Robert's assignation; and that Sir John, who was the only creditor, could not be compelled, or had no interest to quarrel the same.

Vol. II, Page 404.

1676. *January 27.* The MASONS and WRIGHTS of EDINBURGH *against* The SIEVE-WRIGHTS, UPHOLSTERERS, and PLUMBERS.

IN the mutual declarators between the masons and wrights, and other trades incorporated with them, the Lords did, upon the 15th day of December last, find, That five of these trades, that were anciently incorporated before the set, were capable of being elected deacons to the wrights and masons; but the sieve-wrights, upholsterers, and plumbers, being received into that corporation since the year 1646, long after the sett, they appointed the parties to be heard as to them.

It was ALLEGED for the wrights and masons, That these trades were not in the like case with the former; because they were, after the king's decreet-arbitral, settling the constitution and government of the town; which bears expressly, that the deacons should be expert men in their own crafts: but it cannot be pretended that these three petty trades could be expert either in the crafts of wrights or masons, or any of the other trades incorporated before the set; and it were a great detriment to the government of the town, that persons of so mean employment might be capable to be deacons, and so capable of the government of the town; nor could they have skill to oversee the other trades: and their admission, which is produced, limits them to particulars; so that they are incapable of any further, and consequently cannot be thought to be admitted to the highest capacity of that incorporation: for all free donations are strictly to be interpreted, especially privileges; neither could any new trade be assumed after the sett, without consent of the king and the town.

It was ANSWERED, That albeit the masons and wrights, and their fraternity, could not incorporate any trade without consent of the town; yet it could not be denied but that such trades as, by posterior custom, did arise by division of the trades formerly incorporated, could not be excluded from all the privileges thereof: for if, by time and custom, the wright craft were divided, and a distinct craft of coachmakers, cabinmakers, or turners made, they were all truly wrights, though their privileges were not extended to all manufacturers in timber. And, in like manner, cutters of marble, or carvers of stone, though they could do nothing to laying, were yet truly *lithotomi* or masons: and so could not be excluded from all the privileges of the masons: and, therefore, these three trades, being all workers in timber, are wrights, and cannot be excluded from all their privileges: for who can refuse that a sieve-wright is a wright, and an upholsterer a maker of chairs, chests, and coffers: And plumbers, though they work in lead, cannot work unless they be wrights; but much more when

they have admissions, expressly incorporating them to the *confratri* of masons, wrights, and their brethren, by their admissions produced. Likeas they are all distinct trades; having distinct masters; and breeding apprentices; and as fit to be deacons as the other trades already incorporated; who, in the oversight of the work of the incorporation, take the assistance of the masters of the particular trades; neither could the town hinder; but they have actually consented, and have received the composition of those three trades: nor is there any pretence of the king's consent, who acted, by reference, as arbiter, and considered only the balance betwixt merchants and trades: and, seeing these trades have always, since their erection, exercised all social acts, by voting in the election of deacons, and being boxmasters, there is no pretence for excluding them from being deacons: and, *in dubio*, the admission should be interpreted against the wrights and masons, granters of the admissions, who, though they limit their trades as to the extent of their trades, yet it is without any limitation as to privileges.

The Lords found all these three trades capable to be deacons likewise.

Vol. II, Page 405.

1676. *February* 3. THOMAS CULTIE and ——— HUNTER *against* EARL of AIRLY.

THOMAS Cultie and ——— Hunter pursue the Earl of Airly, upon a bond of corroboration granted by him, corroborating two bonds granted by his father after this Earl was infeft in the estate; for which two bonds he could not be overtaken but by this bond of corroboration only.

It was ALLEGED for the Earl, That the pursuers have no title or right to this bond of corroboration, but only to the two bonds corroborated; the assignation whereof doth not so much as contain that ordinary clause,—"With all that hath followed, or may follow thereupon,"—albeit it be granted after the bond of corroboration; and, therefore, it must be understood that the cedent did, of design, forbear to assign the bond of corroboration, that the defender might not be distressed thereupon.

It was ANSWERED, That the assignation to the principal bond and debt carrieth with it, without any express clause, all accessory securities; *quia accessorium sequitur suum principale*, unless there had been an exception or reservation; which is the ordinary way; otherwise, the bond of corroboration would, without consideration, be evacuated: for it could not belong to the cedent, seeing he is denuded of the sum; and it is now pretended that it could not belong to the assignee; but here the matter is very clear, that the cedent designed not to reserve the bond of corroboration; because it is produced by the assignee, which presumes the delivery thereof to him: And that clause,—"With all that hath followed," &c. is *ex stilo*; as is the clause,—"With power to pursue, compone, and discharge:" yet all of them are implied in the very assignation to the debt, unless they be reserved.

The Lords sustained process upon the assignation; and found it reached the bond of corroboration, as being delivered to the pursuer.

Vol. II, Page 409.

1676. *February* 8. WILLIAM AIKMAN *against* JAMES OSWALD.

MASTER William Aikman having obtained decreet, *cognitionis causa*, against James Oswald, upon his renunciation to be heir, pursues adjudication of certain tenements; which being called, and given out to see, was given back without a return,—the advocate who saw it, declaring that he was not for the defenders; and, being called by the clerk, in presence of the ordinary, he obtained a decreet of adjudication: whereupon there is a bill given in to stop the same, craving that it might be given out to be seen, and returned and enrolled.

It was ANSWERED for Aikman, That the defender's mother had insisted in an adjudication before the sheriff, and obtained the same by collusion; and therefore, now, Aikman having obtained decreet before the Ordinary, though in absence, the defender should not, by collusion, delay him, but immediately answer; otherwise the Lords are not obliged to stop or delete his decreet.

The Lords, in consideration of the collusion, refused to delete the decreet; but allowed a sight in the clerk's hands, and to answer before the Ordinary.

Vol. II, Page 411.

1676. *February* 9. DRUMMOND *against* STIRLING.

STIRLING of Ardoch having granted bond of 2000 merks to the Lady Glenurchie; Ednample, as her heir and executor, assigns the same to Rickartoun; who thereupon pursues Ardoch for payment; who ALLEGED, No process; because, this bond being heritable, there is no retour produced, serving Ednample heir to his mother; but only a special service, serving him heir to her in another annualrent, which contained no general service.

It was ANSWERED, That the annualrent being to heirs whatsoever, the special retour, in that annualrent, imported a general service.

Which the Lords sustained.

Vol. II, Page 413.

1676. *February* 9. NICOL RONALDSON *against* JOHN BRYDEN.

NICOL Ronaldson having charged John Bryden for payment of a bond of 300 merks, he suspends, on this reason:—That he ought to have compensation of three stone of cheese, paid yearly, over and above the annualrent for nineteen years.

It was ANSWERED, *Non relevat*, unless there had been a price made, or promise of payment; otherwise the cheese must be understood to be a gratification or free donation. *2do.* The bond pursued upon is of a late date, and the former bond is discharged; after which, there is no ground to come back upon cheese given so many years since.

It was ANSWERED, That *debitor non præsumitur donare;* and, therefore, the cheese must be understood to have been in part of payment; otherwise it might

infer usury, if, with the annualrent of 300 merks, being but twelve pounds yearly, three stones of cheese were yearly delivered, over and above the annualrent: or, if it had been expressly in name of donation or gratification, it would open a door for eluding the law against usury; and, therefore, seeing it cannot be presumed to be usury or donation, it must be presumed to be in satisfaction. And, as to the renewing of the bond, it was upon caption, without any transaction or abatement.

The Lords sustained the compensation being instantly verified and liquidated by the charger's oath, and would not sustain such a preparative to be a cloak for usury.

Vol. II, Page 413.

1676. *February* 15. AUCHTERLONY *against* The MAGISTRATES of ABERDENE.

THE Laird of Morphie having been incarcerated in the tolbooth of Aberdene, upon a debt due to the town, he produces a protection under the king's hand, upon payment of the annualrents, unto the messenger, and offered to pay the annualrents; yet the messenger put him in prison; wherein, he was arrested at the instance of Auchterlony; but thereafter, the magistrates having gotten a security for their relief, let him go. Auchterlony pursues the magistrates for his debt, as suffering the rebel to escape; who ALLEGED Absolvitor; because, he having protection under the king's hand, and offering the annualrent to the messenger, he unwarrantably incarcerated him; and therefore, they might warrantably let him go, notwithstanding of the subsequent arrestments; seeing they were accessory to the first error, and could not have been laid on, if that had not preceded.

It was ANSWERED, That the pursuer, having a caption, might have incarcerated him, being out of the tolbooth, or arrest him, being in it, without considering how he came there: and though he had had reason to have been liberated, by charges to set at liberty, as he had not, yet the magistrates were no judges, much less was the messenger judge, to the protection and offer of the annualrent; nor did he any wrong in refusing the same.

The Lords repelled the defence.

Vol. II, Page 415.

1676. *February* 16. DOCTOR BORTHWICK *against* The EARL of CRAWFORD.

THE Earl of Crawford granted bond to Elizabeth Corstorphine and ——— Gourlay, mother and grandmother to William Borthwick, bearing the sum received in the name of the said William; and obliging the Earl to pay the same to the mother and grandmother, in liferent, and to William, after their decease, his heirs and assignees. But in the same bond, there is a precept of seasine for infefting the grandmother and mother in fee; and seasine given to them accordingly, without mention of William. But thereafter, the mother and grandmother dispone the annualrent to William, acknowledging that they were infeft

in fee by error; and that, by the personal obligement, William was to have been in fee; and therefore they resign in favours of William: whereupon he is infeft, and now pursues a poinding of the ground.

It was ALLEGED for the Earl of Crawford, That there was a transaction betwixt the mother and grandmother and him, whereby they accepted lands for the sum, and entered in possession thereof. So that, if they had the right of fee, the satisfaction made to them must evacuate this right; and the pursuer cannot quarrel the same; because he acknowledges their right of fee, being infeft upon the resignation. And, if they had no right of fee, he hath no real right, but only the personal obligement; which is no title for poinding of the ground.

The pursuer ANSWERED, That the mother and grandmother had, in their person, by their infeftment, a title of fee; but which being by error and ignorance of the writer, might, upon that ground, be legally reduced; and they ordained to denude themselves in favours of the pursuer: and they having done the same of consent, acknowledging the error, the pursuer hath acknowledged their title of fee *de facto*, but not *de jure*. So that the defender cannot quarrel the infeftment that he himself had given; and, if the pursuer's title should not be sustained, but be put back to take a new infeftment, it would be ineffectual; because the Earl's estate is carried away by expired apprisings.

The Lords sustained the pursuer's title for poinding of the ground.

Vol. II, Page 416.

1676. *February* 16. The EARL of DUMFERMLING *against* The EARL of CALLENDAR.

THE late Earl of Callendar having married the Countess of Dumfermling, he became obliged, That the half of the conquest should belong to the Lady and her heirs, if there were no children to succeed thereto; and did also renounce his *jus mariti* to her liferent lands, that she might dispose thereupon at her pleasure. This Earl of Dumfermling, as having right by progress to these provisions, did pursue the late Earl of Callendar and this Earl, then Lord Almond, to whom he had disponed his estate with the burden of his debt, at least without a cause onerous, concluding against both to denude of the half of the conquest; and against the late Earl, to pay his intromissions with the Lady's jointure lands; and against the Lord Almond, that the same might affect the estate. The late Earl being dead, Dumfermling insists against this Earl.

It was ALLEGED, No process against this Earl, till the late Earl's heir, or apparent heir, were called to liquidate these obligements against them; or until the process were transferred. 2*do*. That this Earl, having right by disposition, was in as good case as an heir of tailyie, against whom no process is sustained till the heir of line be discussed.

It was ANSWERED, That the conclusions against this Earl, being either upon his own obligement, to pay his uncle's debt, whereof both the said provisions were a part; or otherwise being *declaratorie*, that his disposition being gratuitous, the lands might be affected with anterior debts by apprising, and the same might be liquidate, there is no necessity to call any other: for, albeit, in a re-

duction before certification, authors must be called to produce, yet, in a declarator, there is no necessity thereof.

The Lords repelled both the defences, and sustained the process.

Vol. II, Page 416.

1676. *July 5.* The LAIRD of GIGHT *against* The LORD ABOYN and PITTRICHIE.

THE Laird of Pittrichie, younger, having obtained a gift of recognition of the estate of Gight, and declared the same; and having also obtained a decreet of declarator, declaring a minute of agreement betwixt him and Gight null; because Gight, being required by instrument to fulfil, did not the same: and having taken several diets to fulfil, was found not to be in a capacity to fulfil; and therefore the minute was declared null, after several diets for two years' time, allowing Gight to fulfil. Whereupon Pittrichie pursued for maills and duties of the estate of Gight; and Gight raised a reduction of the declarator and nullity: and, during the dependence of that reduction, Pittrichie disponed the estate of Gight to the Earl of Aboyn, who was thereupon publicly infeft. In which reduction the Lords inclined to repone Gight, if he were found in a capacity yet to perform the minute; but declared, that the maills and duties of land should belong to Pittrichie, until performance were made. And now Gight, having made a further production, ALLEGED, That he ought to be reponed to fulfil the minute, and the decreet of declarator ought to be reduced; because, by the law of this and all other countries, decreets proceeding upon penal certifications, are always to be reponed against, *ex instrumentis de novo repertis*, which do fully purge delay and contumacy: and there was never any certification more penal than that whereupon this declarator proceeds; whereby threescore chalders of victual were lost, for not securing the teinds of that part thereof disponed to Pittrichie by the minute; which was the only ground whereupon the decreet proceeded, and now is satisfied, without any remaining objection, by a full progress of the right of these teinds, which was found in the hands of the sheriff-clerk of Aberdene; and which was offered to be proven by famous witnesses, who were employed to search for the said writs, and found them in the said clerk's hands.

It was ANSWERED for the defenders, That there is nothing can be more secure than a solemn decreet of a sovereign court, wherein parties have compeared and long terms granted and circumduced; especially as to the Earl of Aboyn, who is now publicly infeft, and is a singular successor, resting upon the security of that solemn decreet. *2do.* Albeit now, the right of the teinds be cleared, yet the right of property of the lands provided to Pittrichie by the minute, are neither secure by a public infeftment, holden of the king, conform to the minute, nor can he be secure by what is offered or produced for the lands provided to Pittrichie; being an old wadset by the Lairds of Gight, his predecessors, and holden of Gight, he is neither secured in the right of reversion, nor in the superiority: for any thing produced is a charter from certain apprisers of the estate of Gight, to the Laird of Fredret, *d se*, not confirmed, and a charter

from Fredret to Gight, likewise *d se*, not confirmed; and so both null: and Fredret's right to Gight is burdened with his relief of Gight's cautionary.

The pursuer REPLIED, That his reason of reduction stands most relevant; and there is no respect to be had to Aboyn's right; because it is purchased during the dependence of the reduction *in re litigiosa:* And, as for the security now offered, it is abundantly sufficient:—1*mo.* Because the lands provided to Pittrichie have been bruiked by him and his predecessors fourscore years, by a wadset; and so the property is fully secured by prescription. 2*do.* The infeftment upon the recognition holden of the king, carries the whole right of these lands; and, if the recognition should be quarrelled, the wadset would stand firm; and the superiority and reversion, belonging to Gight, is conveyed by the expired apprising, whereby the apprisers were infeft by the king: And their charter to Fredret, and Fredret's to Gight, having both infeftments, and to be holden of the king, with a charter by Gight to Pittrichie, or Aboyn, likewise to be holden of the king, may be all confirmed by one charter of confirmation; which may be presently passed in Exchequer.

The Lords found the oath and allegeance for Gight, relevant to repone him against the certification of the declarator of nullity; but adhered to their former interlocutor as to the maills and duties, before performance of the minute, that they belong to Pittrichie by virtue of his infeftment or recognition: and reponed him only on these terms,—disponing with absolute warrandice, and giving real warrandice for relief of Fredret's cautionary.

Vol. II, Page 437.

1676. *July* 5. SAMUEL CHIESLY *against* EDGAR of WEDDERLY.

SAMUEL Chiesly having charged Edgar of Wedderly for payment of 800 merks, for which he became obliged for his brother, as apprentice-fee; he suspended, and raised reduction upon minority and lesion.

It was ANSWERED, No lesion; because the pursuer hath a natural obligation to aliment his brother-german. 2*do.* He represents his father in a considerable estate, who was obliged to aliment his children; and which the Lords have often extended to heirs having a considerable estate, during the minority of the children, so long as they were unable to entertain themselves, and accordingly, modified 50 merks of aliment to the same apprentice: And, seeing his apprentice-fee hath liberated his brother of five years' aliment when he was older, the same ought to be sustained.

The Lords modified 100 merks yearly, for the five years' apprenticeship; but would allow no annualrent thereof, although in the indenture; but, in place of the same, 50 merks of expenses.

Vol. II, Page 438.

1676. *July* 8. FRANCIS MONTGOMERY *against* The TENANTS of BAGLILLIE.

MR Francis Montgomery having pursued a number of tenants for maills and

duties, they compear and depone, That, before the years in question, being 1673 and 1674, they were in use of payment of bolls for each acre; but that they having given it over forty days before Whitsunday 1671, the chamberlain, who had power to set the land for the Countess of Levin, then minor, had given them down a firlot an acre: and likewise deponed, That the pursuer, having married the Countess, agreed to give them down a firlot an acre for the years in question.

Which oath becoming to be advised, it was ALLEGED for the pursuer, That the tenants having deponed upon the old use of payment before the years in question, the law presumes, without further probation, that the same duty is continued *per tacitam relocationem;* and the getting down thereof is an exception only probable by writ, or the pursuer's oath: but is not a quality to be proven by the tenant's own oath; which would be of great prejudice to all heritors, who, for the most part, have no written tacks; and, when they pursue their tenants for their rents, they might, by their oaths, upon pretence of downgiving, abate them at their pleasure.

It was ANSWERED for the tenants, That they might simply have deponed, That the quantity of their rents, for the years in question, was so much as now they acknowledge; and might have denied the quantities libelled: but having been desirous to clear themselves, they have both deponed what the old use of payment was before these years, and what their duty was for these years: which is no extrinsic quality, but is a proper answer to the libel; which is not what their rents were *before* the years in question, but what they were *during* the years in question: And, albeit the pursuer might have libelled upon the worth of the lands, against naked possessors, which would have been relevant to have been proven by witnesses, and would have forced the tenants to except upon a tack, agreement, or use of payment, and prove the same; or if the pursuer had instructed by writ, the former rent by tack, decreet, or discharge, the same would have sufficiently instructed, that, by tacit relocation, the rent continued the same, and put the tenants to prove, by the master's oath or writ, the new agreement or downgiving. But having done neither, but simply referred the downgiving of the rents to the tenants' oaths, it is most proper for them to depone that formerly they were greater; but that, by a later agreement, for the years in question, they were less. And it would be of great inconvenience to poor tenants, who frequently have no tacks in writ, that, if they did acknowledge a former use of payment, they behoved to prove the abatement; when, most ordinary, singular successors insist for proving the quantities of rent by the tenants' oaths, who could know nothing of abatements, and would not suffer their authors' oaths to be taken upon any such agreements to their prejudice.

The Lords found, That any abatement given after warning-time, when the tenants had continued to possess *per tacitam relocationem*, was not a competent quality proveable by their oaths: but, if the agreement was before warning-time, the agreement was intrinsic, as a part of the verbal tack; and the tenants might depone thereupon, without further probation: But found, That the tenants here had not deponed upon the time of the agreement, which was the material point as to the manner of probation; and, therefore, suffered the pursuer yet to resile from their oaths, and prove, by witnesses, what the land was worth of yearly rent the years in question. In which case the tenants might

either admit it to his probation, or except upon an agreement, and refer it to the pursuer's oath.

Vol. II, Page 442.

1676. *July* 13. The COUNTESS of BRAMFOORD *against* EDWARD RUTHVEN.

THE Countess of Bramfoord, having a provision granted to her, by her husband, of 2000 merks yearly, during her life, did thereupon arrest all sums of money in the hands of the Earl of Callander, due to the successors of the late Earl of Bramfoord, to be made forthcoming for her payment. Callander having suspended upon double poinding against the Countess and Edward Ruthven, to whom, by Act of Parliament, the estate of his grandfather, the Earl of Bramfoord, his goodsire, was established; whereby the Parliament declared, "That their meaning and intention in rescinding the forefaulture of the late Earl of Bramfoord, was to establish his estate in the person of Edward Baillie, his grandchild, procreated betwixt the Lord Forrester and the Earl's daughter, Lady Jean; whom they ordained to assume the name and arms of Ruthven, to preserve the Earl's memory; and who, accordingly, since has been designed Edward Ruthven: who ALLEGED, That the Countess could have no interest in this provision of annualrent; because, by the Act of Parliament whereby the Earl of Bramfoord's estate is conveyed to him, there is only reserved to the Countess the provision in her contract of marriage, or terce; and this bond is neither. *2do.* It could only take effect from the Act of Parliament. *3tio.* The Countess is satisfied in her own hand; in so far as she has intromitted with the rents and prices of the Earl's estate in Germany and Sweden, which, by the Act of Parliament, belongs to the said Edward:—

It was ANSWERED for the Countess, That her provision of 2000 merks yearly is effectual from her husband's death, and must affect his estate. And Edward Ruthven having a right, from the Parliament, to his estate, which is *nomen universitatis*, the meaning of the Parliament must be understood, according to equity and justice, that the Earl's estate is with the burden of his debt; which the Lords have accordingly sustained in the case of Patrick Ker, as being a creditor of the Earl's: and the Countess is a more favourable creditor, having no other provision but this bond, which bears to be in place of her terce; and so quadrates with the reservation of Parliament, which is in the Countess's favour, and does not exclude her from the common interest of a creditor, by which, and by the reservation, this bond stands valid. And, as to the allegeance of her satisfaction by the prices and profits of the Earl's estate abroad, it resolves, in effect, in a compensation, and is not liquid; and so not receivable. *2do.* Edward Ruthven can have no right, by the Act of Parliament of Scotland, to the price or profits of lands in other dominions; and so cannot compense therewith, nor discharge the same.

It was REPLIED for Edward Ruthven, That the Countess having, in her own hand, satisfaction by the Earl's estate, she cannot seek satisfaction or payment again out of his estate; for here there is none represents the Earl, but the estate is craved to be affected: and, therefore, if the Countess have so much of the

estate in her hand already as will pay her, she can justly demand no more. *2do.* The Parliament of Scotland, by their Act, can determine the interest of all Scotchmen, as to their interest at home or abroad; and, though a stranger pretending right, as representing the Earl, could not be ruled by an Act of Scotland, yet Scotsmen having estates in Scotland must submit thereto: And there is none pretends right to the Earl's estate abroad but the Earl's daughters and their husbands, who all reside and have estates in Scotland. *3tio.* Compensation extinguishes the mutual obligation, which is compensible *ipso jure*, and may be proponed by those who have no right to the sum with which they would compense, nor can discharge the same: but the sentence of a judge, founded upon law, will declare both debts extinct by obligations; which is equivalent to a discharge: for instance, if an heir be pursued for a sum due by a defunct, he may propone compensation upon a liquid sum due to the defunct by the same party: and it will not be a good answer, that the debt due to the defunct was not moveable, and so belonged not to his heir, but executor; and therefore the heir cannot discharge the same, but the executor: yet the compensation would hold good, that the creditor having, in his own hand, a liquid debt due by the same debtor, both are extinct from the time of their concourse; and neither can be demanded from either party, or any representing them. *4to.* Debts which have *paratam executionem* by decreet, cannot be suspended but by compensations, unless instantly verified: but the Countess hath no decreet, but is pursuing an action for affecting the estate of her husband; in which action, a time ought to be granted for liquidating her intromission, which, becoming liquid before sentence, would become sufficient, though it were a formal compensation, as it is only an action to affect the estate, whereof she has as much in her hand as will satisfy what she doth demand.

The Lords sustained the Countess's bond of provision since the death of her husband; and found, That the Earl's estate, conveyed to his oye, was with the burden of it and his other debts: and found, That Edward had interest, by the Act of Parliament, to propone compensation; and so granted a term and commission to prove the Countess's intromission, and to liquidate the same.

Vol. II, Page 446.

1676. *July* 13. The EARL of MARISCHAL *against* His VASSALS.

THE Earl of Marischal pursues reduction and improbation against his vassals.

It was ALLEGED for one of them, That he produced charter and seasine from the pursuer's predecessor to the defender's predecessor; which, therefore, excludeth him from reduction or improbation of the defender's rights, unless he first improve this right produced.

The pursuer ANSWERED, *Non relevat*, unless the defender produce a progress of infeftments from his predecessor to himself; seeing the pursuer has good interest to reduce or improve any right by progress, whereby he may have the casuality of the superiority, if they were removed.

The Lords found, That the charter and seasine of the vassal's immediate predecessor were sufficient, albeit the heir-apparent was not infeft, if it were notour that he was immediate heir, unless the infeftment produced were im-

proven; but granted certification against any right of the vassal to the superiority.

But it was not condescended, whether this apparent heir was immediate, or if there intervened any person that was, or might be heir; for certification might have been craved against their infeftments.

Vol. II, Page 448.

1676. *July* 14. JEAN LOCKHART and Her HUSBAND *against* JAMES BONNER.

BY contract of marriage betwixt umquhile John Bonner and Jean Lockhart, there is contracted, in name of tocher, 2000 merks by Cleghorn, her father, and she assigns a bond of 6000 merks granted to her by Allan Lockhart, her uncle. And it is provided, that if the said John Bonner should die without children of that or the former marriage surviving, that 4000 merks shall revert and return, and should be forthcoming to the said Jean Lockhart. Whereupon she pursues James Bonner, as representing the said John, his brother, for payment of the 4000 merks.

The defender ALLEGED, Absolvitor; because his brother was not liable to pay 4000 merks, but that the same should revert and return; which, therefore, could not oblige him, unless he had received the sums: which he denies.

It was ANSWERED for the pursuers, That all provisions in favours of wives are effectual, though the tocher be not paid; for the wife, being *sub potestate viri*, and not obliging to pay any tocher, the failing thereof cannot make her liferent fail, as *causa data non secuta;* because the marriage is the cause of the wife's provision.

It was REPLIED for the defender, That, though the allegeance may hold in jointures, yet there is in this contract a large jointure of £100 sterling, which is not quarrelled. But this clause pursued on is not to pay, but is conceived *passivè*, that 4000 merks shall revert and return, and be forthcoming, not expressing by whom: so that the pursuer can only have access against those representing her father and uncle, unless she prove that her husband received the tocher; for he was obliged to do no diligence to recover it; and, although he had, it could be no more than such diligence as was used for himself: so that all he can do is, to assign her 4000 merks of that which is due by her uncle; which he is willing to do; and, though he had received her father's part, he ought to repay no part of it, being less than the husband's half.

It was DUPLIED for the pursuers, That the wife, having a joint interest, and being *sub potestate viri*, the husband was obliged to do such diligence for her as provident men used to do; and, after so long time, when the contractors are dead, it must be presumed that he obtained payment.

The Lords found, That the husband was obliged to do such diligence as provident men used, and that he was liable for 4000 merks, unless he prove that he used diligence, and instruct the reason of not recovering the sum.

The defender then ALLEGED, That he had done diligence against Allan Lockhart, the uncle.

Which the Lords sustained relevant to be proven as to Allan's sum; but, seeing no diligence was alleged against Cleghorn, they decerned the defender liable for the half thereof.

Vol. II, Page 449.

1676. *July* 14. Sir John Keith *against* Isobel Cullen.

Sir John Keith, being infeft in the barony of Caskieben, pursued improbation and reduction against Isobel Cullen and the heir of her husband. She produced her contract of marriage and an extract of her seasine; and, before extract of the certification *contra non producta*, she produced a summons for proving the tenor of her charter and principal seasine; and gave in a bill, craving the certification to be stopped till she might conclude her tenor. Yet the certification was extracted without any answer to the bill, or repelling of the tenor. Sir John now insists on his reason of reduction, that the defender produces only her contract of marriage, and an extract of a seasine from the register of seasines; which being only for publication, without keeping the principal seasine, it hath no effect in improbations; so that certification being granted against the principal seasine, there is no real right. *2do.* Though the seasine were produced, it is base, holden of the husband; so that the certification against his heir makes the wife's right fall in consequence.

The defender answered, That she offered to prove that her husband had a wadset-right, and that by collusion with Sir John Keith, he transacted the same, and suppressed his infeftment: so that, albeit her right fell in consequence, yet she ought to be reponed, because of the collusion, to produce or instruct her husband's right:—all which she offers to prove by Sir John's own oath. And seeing there was no answer to her bill, in relation to the tenor, before the certification, the process ought yet to be stopped till time be granted.

The pursuer replied, That there was not the least diligence done upon the tenor, there being a year since the certification was extracted. *2do.* Certifications cannot be annulled upon probation of tenors, unless the tenor be raised in due time, before the terms in the production be run; for then the tenor is as an incident, that may stop the principal cause of reduction: but if otherwise, certifications could be quarrelled upon probations of tenors, that great security of the lieges would be exceedingly weakened, and an inlet made for multiplying and continuing of pleas: but, as certifications in improbations cannot be reduced *sub prætextu instrumentorum de novo repertorum*, much less can it be reduced upon making up of the tenor by witnesses; which is far less than the principal writ found out after the certification.

The Lords found, That the certification being recent, and bearing the production of the tenor, and bill thereupon, without any answer of the Lords repelling or sustaining the same, they found the tenor was not thereby eleided; but would not stop proceeding in this state of the process, upon that account, but reduced with reservation of the tenor. And, as to the allegeance of the collusion, as to the husband's right, they allowed the same by reduction, and also reserved the wife's terce, in case she failed in the tenor.

Vol. II, Page 450.

1676. *July* 26. Umphray *against* Cornelius Neilson.

Cornelius Neilson having freighted Umphray's ship from Aberdene to

Leith, with timber, by a charter-party; Umphray thereupon charges for the freight. Neilson suspends upon this reason, That after a part of the timber was embarked, the admiral arrested the timber; and the said Cornelius wrote to the skipper, that he would satisfy him for the time of his attendance, and desired him to disload what he had embarked; which he did accordingly: And, therefore, seeing he had found the ship at Aberdene, where he had freighted the same, and that he had been impeded to fulfil the charter-party, without his fault, and that the charger had accepted of his offer, and disloaded accordingly, he could not be liable for the freight. And, albeit the skipper came to the Road of Leith, on his way to Borrowstounness, the suspender was not liable, unless it could be instructed that he had lost a freight between the date of the charter-party and the time of disloading the timber, or sustained any other damage.

Which the Lords found relevant to liberate him from the freight, and to make him liable for all other damages.

Vol. II, Page 459.

1676. *November* 14. THOMAS LAWRIE *against* ANGUS.

THOMAS Lawrie, having shipped some silk-ware at Rouan, he obtained his bill of loading to be delivered at Leith when the ship landed there. He, finding the goods to be embezzled, pursued the skipper for damage, and obtained decreet for 400 merks, for spoiling of the goods, and for 100 pounds for detention thereof. Angus, the skipper, gives in a bill of suspension: and the cause being appointed to be heard upon the bill, he insisted on this reason, That he was unjustly decerned, having proponed this relevant defence, that the spoiling of the ware was neither by his fault nor negligence; because he offered him to prove, that his ship and pump were sound, and in good condition, at his loosing; and that he had stowed the pursuer's ware in a safe and convenient place of the ship; but that he himself had changed them from that place of the ship, and had put them low in the hull of the ship, near the pump, that they might be less accessible to *capers*, lest they had come to search the ship: so that he had done all that was his part as a diligent and provident master, who would only have put such ware as would not have spoiled with water near the pump. And as for the detention, he had good reason to detain the ware till the freight was paid.

It was ANSWERED, That the master of the ship, by his office and contract of conduction, is obliged to preserve the merchant's ware safe; and nothing can exoner him but such force or *casus fortuitus* as he could not foresee or prevent: so that no leakage in his pump can liberate him, unless it had been incident by stress of weather, which could not have been repaired at sea; which is not alleged. Neither is it relevant, though it were true, that the merchant stowed his goods near the pump, seeing the pump should have been sufficient against leakage; neither did the skipper show the master any hazard in that place more than the other.

The Lords found the reason of detention of the ware, till the freight was paid, relevant; and found the other reason also relevant, that, when the ship loosed, the pump was sufficient against any leakage, which leakage fell in by the

way, and could not be prevented or helped; without necessity to allege stress of weather: and that he had stowed the ware in a convenient safe place; and the merchant had changed the same, and put them by the pump. But it was not alleged that the skipper was present; or whether he showed any hazard in that place.———[*See page* 212.]

Vol. II, Page 468.

1676. *November* 15. EARL of TWEDDALE *against* The LAIRD of DRUMELZIAR.

THE Earl of Tweddale gave in a bill, representing, That Robert Fergushill was adduced as a witness to astruct the verity of a disposition, bearing to be granted by the late Earl to Drumelziar, of certain lands; and bearing, that the said Robert is writer and witness, and that he had information of several grounds against the inhability of the said Robert; and therefore desired that he might not be received till the conclusion of the cause.

Which the Lords refused, in respect of their common custom that all witnesses are admitted, unless relevant objections be instantly verified against them; for, if that cannot be, parties can only protest for reprobators: and, therefore, the Lords ordained the witnesses to be received; and, if any relevant objection were proponed and instructed, ordained the Ordinary to discuss and admit the same. And further, declared, that if the petitioner condescended upon relevant objections, to be instructed before advising the cause, they would admit the same upon a summary citation against Drumelziar and Fergushill himself.

Vol. II, Page 464.

1676. *November* 15. The LAIRD of CUNNINGHAME-HEAD *against* The EARL of LOWDOUN.

THE Laird of Cunninghame-Head,—having procured a joint right to the first apprising of the estate of Lowdoun, led by Mr Livingstoun his son and heir,—pursues for maills and duties effeiring to his proportion; and several interests of other parties being produced, there was an auditor named to discuss the same. There is now a supplication given in for Cunninghame-Head, representing, That the Earl of Lowdoun's advocates, by dropping in of seasines of several parties from time to time, without warrant from these parties, had delayed the process for several years; and therefore desired that no further delay should be upon that account.

The Lords ordained intimation to be made, that all parties pretending interest might produce such interests as were in town; and that none should be admitted but upon the pursuer's declaring, upon oath, that they were employed by the parties to whom these rights belonged; with certification, that no other should be admitted, before sentence, to stop this decreet.

Vol. II, Page 464.

1676. *November 24.* WILLIAM WEIR *against* The EARL of CALLANDER.

THE late Earl of Bramfoord, having granted a bond of 5000 merks to Patrick Ker his grandchild, by his daughter, married to the Laird of Fairnilie; he did pursue the Lady Forrester, and the Lady Fairnilie, as charged to enter heirs-portioners to their father; and likewise Edward Ruthven, son to the Lord and Lady Forrester, as he in whose favours the estate of the Earl of Bramfoord, which was forefaulted in one of the rescinded Parliaments, during the troubles, was restored and established by Act of Parliament; and, for preserving the Earl's memory, the said Edward was ordained to take the name of Ruthven; and thereby the said Earl's estate being conveyed to the said Edward, the same behoved to be understood with the burden of the Earl's debts: And the pursuer insisted against them all for payment. The Lady Fairnilie produced a renunciation. The pursuer insisted next against Edward Ruthven, and obtained a decreet, whereby the Lords found, That the settlement of the Earl of Bramfoord's estate, in the person of Edward Ruthven, not being merely a donation of a forefaulture, which is not subject to debts of the forefaulted person; but proceeding with consideration of the injustice and unwarrantableness of the forefaulture of the Earl, and that the name of the estate of the Earl, as being *nomen universitatis*, did comprehend his whole means, both real and personal, was to be understood to be liable to the burden of his debts; and therefore declared, That his estate might be affected by any real diligence for this debt. This being the express terms of the interlocutor, under the principal clerk's hand,—upon a debate *in præsentia* the decreet is extracted, not only bearing this declarator, but a conclusion against Edward to pay; and, in the decreet, the pursuer declares, That he passes from personal execution against Edward. Mr William Weir, advocate, as assignee, adjudges a part of the sums due by the Earl of Callander to Edward Ruthven, and the infeftments granted by the Earl for security thereof; and now pursues for mails and duties. Of this decreet, and of the adjudication in consequence, there is reduction raised, and insisted on by the Earl and Edward; wherein Callander alleges, that he hath made payment to Edward Ruthven of part of the sums; and produces his discharge: which must not only liberate him, as having paid, *bona fide*, upon the Lords' decreet, before any diligence against him, but likewise on this ground, that he had raised a summons of double-poinding; and called Patrick Ker and Edward Ruthven. Whereupon Edward was preferred, and Patrick decerned not to trouble him; and therefore, by the Act of Parliament 1584, chap. 3, statuting, "That where any party is lawfully summoned in a double-poinding, and not compearing, or showing his right, he shall not be heard to reduce the decreet, nor be restored against the same, except he have a necessary cause of his absence; and the obtainer of the decreet shall only be obliged to answer, in the second instance, to the right which the party complaining shall produce, whether it be valid to bruik by at the time of his complaint and suit, and no otherwise; but shall be liable to no action for bygone profits, intromitted with by the obtainer of the decreet, from the obtaining thereof:" whereby Callander is secure, both as to what he hath paid, and Edward Ruthven as to what he hath intromitted with; albeit the decreet be in absence as to Patrick Ker.

It was ANSWERED, That Edward Ruthven being preferred, his preference accresces to Patrick Ker and Mr William Weir, his assignee deriving right from Edward by adjudication.

The Lords found, That the payment made by the Earl of Callander did secure him against both.

The next reason insisted on was, That the decreet at the instance of Patrick Ker against Edward Ruthven is null, and clearly disconform to the Lords' interlocutor produced, which is only declaratory, finding, That the estate of Bramfoord might be affected: And therefore the decreet is unwarrantable and null, and the adjudication thereupon falls in consequence.

It was ANSWERED, That the declarator being expressly for affecting of the estate, it could take no effect without a decreet for payment, *cognitionis causa*; for apprisings and adjudications bearing in payment and satisfaction, unless there be a decreet for payment, they cannot proceed; and therefore that member of the decreet, decerning Edward to pay, though it be expressed simply *quoad* real execution, and might have been unwarrantably extended to Edward's other estate, yet, being only extended to the estate of Bramfoord, *eatenus* it is valid; *et utile per inutile non vitiatur*. Likeas the Lords are accustomed to sustain the real executions of creditors though defective in some formalities, where material justice is observed, and no more formal right is excluded.

It was ANSWERED, 1*mo*. That upon this mere declarator no execution could proceed, until a decreet *cognitionis causa*, for establishing the debt in some person *passivè*, had been obtained; which ought either to have been against the apparent heirs of the Earl of Bramfoord, according to the ordinary custom, when apparent heirs are charged to enter heirs: if they renounce they are assoilyied; and yet, before adjudication, they must necessarily proceed against the apparent heirs *cognitionis causa*, bearing their renunciation; and it is necessary, before adjudication, to have decreet against them for affecting *hæreditatem jacentem*. But in this case there is nothing libelled for a decreet *cognitionis causa*, either against the apparent heirs or against Edward; but a conclusion of payment extracted, without the least shadow or warrant. And there were also good reasons to sustain a decreet of payment given by the King of Spain, as by a clerk of the session without warrant, upon pretence that there is nothing against material justice, or that it may be restricted to that which agrees to material justice; *viz.* decerning only Edward to pay *cognitionis causa*, by affecting the estate of Bramfoord. So that nothing can be more palpably null than this conclusion in whole or in part, as not only *ultra petita*, but *sine libello*, and without any authority. And whatever the Lords may do in matters within their latitude, *ex arbitrio judicis et nobili officio*, yet, beyond question, that cannot be demanded in justice, but in favour; in which the Lords use to consider all the circumstances of the case, but have no motive to extend their favour in this case: this adjudication proceeding upon an assignation taken by an advocate *pendente processu*; and which is informed to be with great advantage, and who being all along advocate in the cause, first for the Earl of Callander, and then against him; and proceeding to adjudication upon a decreet so unwarrantable, wherein it may well be presumed that he hath been instrumental with the clerk to foist in the most material article in the decreet, without the Lords' warrant: so such practices should not be favoured, whatever favour may be shown to unskilful people proceeding *bona fide sine dolo*; and by which Mr William is only

put back to the legal course, wherein he will neither lose his debt, nor be prevented by any other; for there is no other adjudication but this.

The Lords found the reason of reduction relevant against that member of the decreet decerning payment; and, as to that point, found it null, and reduced the same; and the adjudication thereupon, in consequence.

Vol. II, Page 465.

1676. *December 5.* LOWRIE *against* ANGUS.

[*See page* 208.]

THE process betwixt the parties being discussed, and observed upon the 14th day of November last, yet being heard and reported again, the charger ALLEGED that it was the custom of all provident skippers to have a pump-stelling covered with pitched canvas, to guard against the spouting of the pump; which was wanting in this ship, and therefore the damage sustained by the charger was through his fault: neither is there any cause condescended upon, whereby the ship or pump became leaky, which could not be foreseen at the loosing, conform to the former interlocutor; and, therefore, the charger craved his allegeance to be admitted to his probation; specially seeing the skipper's witnesses were to be his own seamen, and it would be of dangerous consequence if the spoiling of merchants' goods might be evacuated by such probations.

The Lords would prefer neither party to the probation; but, before answer to the relevancy, allowed either party to adduce witnesses, what the custom of skippers to secure their pumps was, and what was the cause of this pump's becoming leaky or spouting, or if there was any storm or stress of weather in the voyage.

Vol. II, Page 471.

1676. *December* 13. JOHN INGLIS *against* The CREDITORS of EAST-BARNS.

IN a competition amongst the creditors of East-barns, Mr John Inglis craves preference, because he stands infeft by the common debtor, long before any other creditor.

It was ANSWERED, That his infeftment is base, and the other creditors are infeft upon apprisings, before any possession in his person.

It was REPLIED, That he produces discharges of four years' annualrent of his sum, before the common debtor's son's infeftment, from whom the creditors have apprised.

It was REPLIED, That this discharge can import no possession by his infeftment, which is conditional, That if he be not paid of the sums due to him, and relieved of his cautionary, he should enter to the possession of the lands; but this discharge is only of his annualrents by his debtor.

It was DUPLIED, That where there is no ground of simulation, a base infeftment is valid; especially being for warrandice or relief, whereby it can attain no possession till distress. *2do.* This discharge doth expressly relate to his infeftment of relief.

The Lords sustained the reason of preference on the said Mr John Inglis his infeftment, relevant, in so far as concerns the sum due to him, whereof he received annualrent by the discharges produced.

Vol. II, Page 478.

1677. *January* 3. The EXECUTORS of MR GEORGE HUTCHISON *against* The MAGISTRATES of IRWING and COLLEGE of GLASGOW.

MASTER George Hutchison, being indulged by the council to serve as minister to the kirk of Irwing *in anno* 1669, did accordingly enter and serve the whole charge. But, *in anno* 1672, there was an act of council, ordaining two indulged ministers for every indulged kirk, and declaring, that if they did not enter accordingly, the one half should be vacant, and should belong to the Colleges, according to an Act to be made in that session of Parliament. And some days after, there was an Act of Parliament made, applying the vacant stipends of all churches to the universities; yet the council, considering that few of the ministers entered in conjunction, did, by several Acts, grant the whole stipend to those who served the whole cure. The magistrates of Irwing gave bond to the College of Glasgow for the half of the stipend 1672, which was consigned; and a back-bond granted, that if the College prevailed against the minister's successors, it should be paid accordingly.

It was ALLEGED for the College, That the warrant of the council to pay the minister's executors, was *parte inaudita;* and the indulged ministers having only right by the council's warrant, and during their pleasure, therefore they might and had declared the one half vacant, and apply it to the universities.

It was ANSWERED, That the College can have no right, because the act of council relates to an Act of Parliament to be made; which Act of Parliament bears only,—That where the kirks are vacant, the stipend shall be the university's; but this stipend was not vacant *in anno* 1672. *2do.* Though the act of council had been simply to make the one half vacant, in favour of the universities, yet the council may repeal their own act, in whole or in part.

It was REPLIED, That though they may repeal, yet it can only be *ad futura;* and this half year in question was long after the year was past, *et fuit jus delatum* to the College; which thereby becoming their private right, the council could not take it from them.

It was DUPLIED, That if this reason were good, the colleges behoved to have right to the half of all the indulged kirks in Scotland, for there is *jus delatum* in all time after the Act; but it is unquestionable that a general rule, proceeding upon the free pleasure of authority, without any antecedent private right, though thereby a benefit would accrue to any private party, yet thereby the same authority is in full capacity to recal their act, either as to the future, or, if it be so expressed, *à principio.* And, though private parties be secured of what they have recovered, as *fructus bonæ fidei percepti*, yet, so soon as the Act is repealed, their interest ceases as to what is not paid.

The Lords found, that the College had no right, by the Act of Parliament, but by the act of council; and found, that the council might repeal or qualify their own act, either as to time coming, or *à principio*, if they so express it;

and that in this case, and of all the indulged ministers, they had given warrants to pay the whole to the indulged ministers, for all the years they had served alone; which warrants were granted after the years in which they had served.

Vol. II, Page 485.

1677. *January* 13. MEEK, Skipper.

MEEK, skipper being first holden as confessed before a sheriff, and after being reponed by the Lords, and a day taken to produce him; he went to sea some days before the term; which being circumduced, a supplication was given in on that ground, that the skipper was gone abroad before the term.

Which the Lords refused, seeing he ought to have attended the term, or have offered his oath before the term; and, therefore, the Lords now refused to repone him in this second suspension, though he offered to depone, that he was not advertised by his advocate. And now, by supplication, he offers to refer to the charger's own oath the verity of his own libel. Which the Lords sustained, seeing "being holden as confessed" is but a presumptive probation, and therefore a positive probation of the contrary, by the oath of the pursuer, is sufficient to take off the same.

Vol. II, Page 493.

1677. *February* 12. JAMES NAISMITH, Younger of Posso, *against* EDWARD RUTHVEN.

JAMES Naismith, younger of Posso, having obtained a gift, from the king, of his father's single escheat, pursues the tenants of Lethem, liferented by the Lady Lethem, now spouse to Posso elder, and belonging to him *jure mariti*, and thereby falling under single escheat. Compearance was made for Edward Ruthven, who obtained a gift of the Lady Lethem's liferent-escheat from the Duke and Duchess of Hamilton, of whom the lands were holden; the Lady having been denounced, before her marriage with Posso: so that his *jus mariti* could not reach the rent of these lands which were fallen by liferent-escheat in Duke Hamilton's hands.

It was ANSWERED, That the gift was purchased from Duke Hamilton, by the means and moyen of the Lady Lethem herself, and taken in name of the deceased Mr John Baillie, advocate, who assigned the same to Edward Ruthven, the Lady Lethem's grandchild; and, though his assignation bears, That his name was in trust for Edward Ruthven, yet, Edward being a child, it could not be supposed to be obtained upon his own account.

The Lords ordained the Duke and Duchess of Hamilton to depone, whether they received any sums for this gift, and from whom; and if it was granted freely; upon whose account, and to whose behoof, it was granted.

Vol. II, Page 519.

1677. *June* 13. BORTHWICK of PILMOOR *against* The LAIRD of KIRKLAND.

THE lands of Pilmoor and Kirkland, being both parts of the muir of Haddingtoun, came thereafter to belong to divers heritors: those of Pilmoor were infeft expressly *cum puteo*: and there are two wells in Pilmoor; the one, called the Lady-Well, had a constant rivulet, which, above fifty years, is proven to have run to the house of Kirkland, and hath had, of long time, a timber spout lying upon the lands of Pilmoor, near the marches of Kirkland; whereby the water is hindered from the descent, and made to run level with a brae, by which it runs to the house of Kirkland; and, following the natural course and situation, it would not run that way. There are mutual declarators betwixt Pilmoor and Kirkland; the former being *actio negatoria* for declaring his lands free of the rivulets running that way; the other *confessoria*, for declaring that the water ought to continue to run that way to Kirkland. Whereupon witnesses were examined *hinc inde*, both as to the possession and interruption; and there is produced a submission betwixt the heritors of Pilmoor and Kirkland, *in anno* 1622, concerning the course of this water. And the witnesses for Kirkland being interrogated, Whether the water had run to the house of Kirkland past memory, or, at least above forty years: one of them depones, That it ran so sixty years; and two others, that it ran so above fifty years. Interruptions are also proven frequently these forty years past, by taking up and breaking the spout, whereby the water run by its natural course some days; and two instruments of civil interruption produced.

At advising, it was ALLEGED for Kirkland, 1*mo*. That so old a possession of this course of the water being proven by writ and many witnesses, the same ought so to continue, having so run when both these lands belonged to one heritor, without the constitution of any servitude *de jure communi*. 2*do*. A servitude is here constituted by use and prescription, which is proven to have been immemorial; which must infer that it was so for hundreds of years past: and, therefore, no interruption within these forty years can be effectual, seeing immemorial possession imports forty years' possession before the first interruption; unless immemorial interruptions were also proven. And though the submission and witnesses prove but fifty-five years' possession, that imports immemorial possession: it being a negative, and cannot possibly be proven further, than that ancient witnesses depone of their knowledge of possession for fifty or sixty years; and no other witnesses depone when the said possession began.

It was ANSWERED, That, albeit *in possessorio*, the course of a constant stream of water may not be altered *ad libitum*, but suffered to run as it ran the former summer; and that for public utility's sake: as, if a mill or other public work be built thereupon, by the knowledge and tolerance of the heritors through whose lands it runs, the same cannot be altered, to the prejudice of the said public work. But otherwise, an heritor suffering a rivulet, running from his own proper well, to run such a course 100 years, cannot hinder him to stop it, or turn it to his use any other way. And, as to the servitude, it is not here constituted, seeing there are frequent interruptions proven. And the submission, which is the eldest probation, as it may infer possession, so it doth infer interruption; for, as *provocatio ad judicem* is a civil interruption, albeit the judge were not competent, because it takes off *patientiam Domini*, and his acquiescence and re-

linquishing his right; so, much more doth any act, by way of fact, or by way of instrument, for express impediment of that servitude. And, as ancient possession may presume anterior possession, so must ancient interruptions import prior interruptions. Neither is the immemorial possession proven; for it is necessary, for immemorial possession, either to prove that it was holden and reputed to be immemorial, or to prove the possession so ancient, as, by the course of nature, witnesses cannot be had who can know a more ancient, and so cannot know the beginning of the possession: but fifty or sixty years' possession may admit of witnesses who may know for twenty years before; and so might know the beginning of the possession.

The Lords found, That the parties had not adverted to the importance of immemorial possession; which would not be elided by interruptions within forty years: And, therefore, they ordained one of their number to visit the ground, and to examine the most ancient witnesses adduced for either party, for clearing whether the beginning of this water course towards the house of Kirkland could be proven; that thereby it might appear whether it be immemorial or not, or whether forty years before the first interruption or not.

Vol. II, Page 521.

1677. *June* 19. DICKSON *against* EDGAR.

IN a pursuit at the instance of Mr George Dickson against Edgar of Wedderly, wherein Mr George insisted, as heir to his brother, Mr Robert, for transferring of a decreet, at his brother's instance, against Edgar of Wedderly, which was pronounced, but not extracted, in his brother's time; the defender ALLEGED Compensation; because the pursuer's right was as heir to his brother, who was assignee by Nethermains, by whom his name was filled up in blank assignations and translations, which were Nethermains's rights, in his own hand; and, therefore, were compensible by Nethermains's debt: and, therefore, Wedderly, as executor-creditor to old Wedderly, his mother's father, having confirmed a debt due by Nethermains's father to old Wedderly, had good interest to compense a debt due by old Wedderly to Nethermains, against Nethermains's assignee; it being an uncontroverted rule, that compensation is relevant against the assignee, upon the cedent's debt prior to the intimation.

It was ANSWERED, 1*mo*. That the pursuer's brother did obtain decreet, against this Wedderly, before the Sheriff of Berwick; and therefore, by the Act of Parliament anent compensation, it was not receivable *post sententiam;* and the Lords had lately decided that they would not receive compensation after sentence, though in absence, and of an inferior court. 2*do*. Compensation must be liquid *inter easdem partes:* but here, the time of the pursuer's brother's completing his right by assignation, both by apprising, that needs no intimation, and by intimation by citation; the defender had then no right to the sums wherewith he would compense, but was only executor-creditor; which is but like to an assignation; which will not found a compensation against an assignee, unless it had been intimated before the intimation of that assignee's assignation.

It was REPLIED, That the defender was not executor-creditor as a mere stranger, but was one of the nearest of kin to the defunct; which gave him sufficient

interest to propone compensation of a debt due by the defunct, with a debt due by that same creditor to the defunct; for, by the concourse of these two debts *inter easdem partes, primo momento* of the concourse both were extinct; which might not only be proponed by those who had right to the sum whereupon compensation was founded, but to all others having interest, who might allège compensation as well as payment; and, therefore, an heir might propone compensation of an heritable debt, due by a defunct, upon a moveable debt due by the defunct to that same creditor, though he could not otherwise discharge a moveable debt; but the decreet would import a discharge: and so a cautioner may compense upon the debt of the principal; and a relict, bairns, or nearest of kin, may compense upon any debt due by, and to a defunct, which were liquid: which liquidation required no decreet; but that *debitum* and *creditum* were clear and commensurating in the defunct's time.

The Lords sustained the compensation against the party filled up unwarrantably in a blank right, upon the debt of him who had the said blank right in his power and possession as his own, upon a debt of the first creditor, being liquid, though no sentence followed in his time: And found, That any of his nearest of kin might propone that compensation, though having but a right only to the debts with which it was compensated: but found the compensation not receivable *post sententiam*, though in absence, unless the sheriff's decreet were found null; but sustained several allegeances of nullity against the same.

Vol. II, Page 525.

1677. *June* 21. DOWIE *against* ELISON.

JANET Dowie, by her contract of marriage with Robert Elison, being provided to her liferent of all sums, goods, and gear, conquest during the marriage; and, if in case of children, to the fee of the half: pursues a declarator of her right of the said contract against her husband's executors: who alleged, Absolvitor; because the defunct, by his testament, had provided the pursuer in the annual-rent of 5000 merks, in satisfaction of what she could claim at his death; whereby there was *jus quæsitum* to her, inconsistent with the contract of marriage; and, except she refused the provision in the testament, and continued her right, it did extinguish the provision of the contract.

It was ANSWERED, That the provision of the testament became not her right till she accepted it; and she was not clear yet whether to accept it or not, till she found, by the event, which of the provisions were most effectual.

The Lords found the pursuer obliged either to reject the provision in the testament, being now shown and produced to her; or otherwise they sustained the defence thereupon, to exclude her from the contract.

Vol. II, Page 526.

1677. *June* 26. GRAHAME and BOYD *against* MALLOCH.

IN a count and reckoning at the instance of Grahame and Boyd, against

Malloch, for extinction of Malloch's apprising, by intromission within the legal; Malloch craved a defalcation out of his intromissions, for the expenses of a process of reduction at his instance, against a third party, who had an inhibition which would have excluded both parties' rights; and for the sum he paid out profitably for both parties, by transaction, for being free of that inhibition.

The Lords found, That no such defalcations of the appriser's intromissions were to be allowed; but only such as were real burdens upon the land: but, as to that conclusion of the account for repetition of Malloch's intromission, after he was satisfied, they found compensation competent to what he profitably expended for the behoof of both parties, to secure them against an inhibition which would have affected them both.

Vol. II, Page 531.

1677. *July* 6. LOCKHART *against* LOCKHARTS.

THE deceased Stephen Lockhart of Wickedshaw, having communed a marriage for his eldest son, did, before the contract of marriage, take a bond from his son, bearing, That, albeit by his son's contract of marriage, he was to dispone to him his whole estate, with the burden of 4600 merks to his children, yet it should be leisom to him to burden the estate with 1400 merks more to his children; and making both sums, bearing annualrent after his death. The contract of marriage is subscribed three days thereafter. William, the son, having shortly deceased after the marriage, Stephen, the father, did divide the 6000 merks among his children, and died *in anno* 1663. William, son and heir to William, son to Stephen, *in anno* 1664, counted with Walter Lockhart, one of the children, and with Robert, another of them, *in anno* 1671, for their shares. William, the oy, having also died, the said Walter and Robert pursued his son and heir for their portions, who alleged, Absolvitor:—1*mo*. Because, as to the 1400 merks, and the additional annualrent, it was *contra pacta dotalia*, and so *contra bonos mores*, and thereby null; for, if the father had disponed his estate without mention of his children's provision, a bond by the son in their favours, being anterior, might have been effectual; but the contract of marriage bearing expressly a burden to the children of the 4600 merks, any further was not fair, but fraudulent, in prejudice of the wife and her relations, who would not have otherwise proceeded in the marriage. 2*do*. This bond by a son to his father, being minor, is null; he not being authorised by his father, who was his lawful administrator, and could not authorise *in rem suam*.

It was ANSWERED, That these provisions being expressly to the behoof of the children, granted before the contract of marriage, were valid; for such provisions, contrary to contracts of marriage, can only be null *in quantum* there is a true prejudice and wrong to the parties-contractors; wherein their interest, not their humour, is to be considered: so that the addition of 1400 merks, (there being many children, and their whole provision being but 6000 merks, bearing annualrent after their father's death,) it was the discharge of a natural duty, and no wrong to the son or wife, who were put in the whole estate. And, as to the nullity, the bonds were homologated by the oy, after his majority, by

counting for, and paying the annualrent expressly relative to the bonds; and it is most unfavourable to quarrel the bond or contract, passed near 40 years since, which did draw in question the grandsire's deed.

It was REPLIED, That homologation can only be by express deeds of knowledge; but the oy might have been ignorant of his father's contract.

The Lords found the homologation by an account relative to the bond, and payment of annualrent thereof, for many years, sufficient to exclude any question against the bond; and therefore dived no further into the nullities.

Vol. II, Page 534.

1677. *July* 12. MONTEITH *against* HENDERSON.

HENDERSON of Fordel, having raised improbation of a disposition, by Randifoord to Carrubber, of his estate; and having desired the writer and witnesses inserted to be examined, to remain *in retentis*, lest they might die, or be put out of the way, before the process, by the course of the roll, might come in: they were accordingly examined. Carrubber did likewise pursue a declarator of his right to be true and valid; and desires that certain witnesses, here and abroad, be examined, to remain *in retentis*, whether or not they heard Randifoord declare that he had disponed his estate to Carrubber; and likewise that he might have warrant to cite several witnesses, who heard one of the witnesses inserted declare that he had gotten 200 merks from Fordel to depone.

It was answered for Fordel, That he, being in an improbation, wherein the direct manner is used, and the writer and witnesses inserted examined; till that be concluded and determined, there is no place for the indirect manner, either by improbation or approbation. And as to the examination of witnesses, upon one of the witnesses inserted his declaring he had received 200 merks, it is a reprobator, and should not be sustained but by way of ordinary action, and after sentence.

The Lords found, That if there were no doubtfulness in the improbation by writer and witnesses, there was no place for the indirect manner: but, because there were only two witnesses, and the testimony of one was quarrelled, they gave warrant to cite the witnesses quarrelled, and other witnesses to be condescended on, before extracting of this warrant, upon his hability; and declared they would sustain the same as a reprobator, to proceed, as an incident, with the principal cause of improbation summarily, without going to the roll as a distinct process; but that they would not stop the principal cause in dependence before, by the dependence of the reprobator.

Vol. II, Page 537.

1677. *July* 24. The EARL of DUMFERMLING *against* The EARL of CALLENDAR.

THE Earl of Dumfermling, having pursued the Earl of Callendar before the

council for a riot, for carrying away the plenishing of the house of Pinkie, belonging to the Countess of Dumfermling;—He alleged, That the property of the goods belonged not to the Countess, but to the Earl, her husband, *jure mariti*. It was answered, That the Earl, before his marriage, had renounced his *jus mariti*. And it being replied, that, by the supervenient marriage, the right of the moveables returned to the husband *jure mariti*, the council, in respect the spuilyie was old, superseded to give answer till the property of the moveables was decided before the Lords of Session. Which being now debated,—

It was ALLEGED for Callendar, That, albeit this renunciation of the Lady's moveables bore date before the marriage, yet it was truly granted the time the Earl's estate was sequestrated by the English, long after the marriage; and so is *donatio* between man and wife, revokable, and, *de facto*, revoked under the Earl's own hand. *2do.* Marriage being a legal assignation, suppose the moveables had been the Earl's before the marriage, and had been disponed by him to the lady, yet they did return by the subsequent marriage. *3tio.* The public law hath established the right of man and wife as to moveables, that there is a communion between them, and that the husband hath the management; and there is no exception but a competent aliment to the wife, *ad victum et amictum*.

It was ANSWERED for the pursuer, That the defender can never pretend that the writ subscribed by his predecessor was false; which would be forgery. *2do.* Whatever might be said in a simple assignation, this renunciation is in contemplation of the marriage, and so in the same condition as in a contract of marriage; in which case, the husband or his heir would certainly be repelled, by a personal objection, to question the wife's right, whatever the creditors might say. *3tio.* The moveables being extant after the dissolution of the marriage, as there is no question but all provisions are allowable, by husband and wife, to take effect after the marriage, so must this as to these goods extant. Neither is it essential to marriage to have this communion of goods; which the Roman law hath not; and therefore it may be renounced.

It was ANSWERED, That this being a public law for public utility, private pactions cannot derogate therefrom. But this communion is competent *ipso jure*; and no paction can free husband or wife of the debt of each other; so neither, of the communion of moveables. And, on the same ground, donations between man and wife are revokable; which no renunciation, or contract of marriage, or otherwise, can alter, both these being introduced for the quiet of a conjugal society. And this renunciation relates not to the dissolution, but to the standing of the marriage; bearing expressly that the husband should not meddle with the moveables but by the wife's consent; which is an inconsistent interdicting him to his wife, contrary to the power of the government of his family: which was found inconsistent in the case betwixt the Lady Collingtoun and her husband, where, before the marriage, the lady disponed the half of her liferent to Ratho, who gave a back-bond to employ it to the use of the family of the future spouses: and though, thereafter, Collingtoun ratified Ratho's right, and renounced his *jus mariti*, yet the Lords found, that, Ratho's back-bond applying it to the benefit of the family, that the lady could not separate from the family, and crave a share; nor, being in the family, have any share in the management; but that the husband had it alone, as an inseparable right.

The Lords found the allegeance for Callender relevant, that this renunciation

was antedated, for a reasonable cause, to exclude the usurpers from sequestration; and, therefore, found it relevant, that it was duly subscribed during the marriage, and revoked by the husband as a donation to the wife; and reserved the other point, which needed no probation, till the close of the cause.

Vol. II, Page 547.

1677. *November* 8. BARBARA GRANT *against* JANET CUTHBERT.

BARBARA Grant, being executrix confirmed to her husband, did make payment to Archibald Neilson, her son, of a bond granted by the defunct his father, to him and Janet Cuthbert, his future spouse, and the heirs betwixt them; which failyieing, Archibald's heirs;—whereupon she obtained decreet before the Sheriff against the said Janet Cuthbert, to exhibit and deliver the said bond, as satisfied. Janet Cuthbert raises suspension and reduction, on this reason, That the Sheriff had committed iniquity in decerning her to deliver up a bond of a sum provided to her in liferent by her husband's father before her marriage; which sum he could not uplift, nor the debtor pay, without the liferenter's consent, unless the debtor had seen the sum securely re-employed for the wife's liferent.

It was ANSWERED, That the husband was fiar, and *dominus bonorum;* and the executrix having made payment upon sentence, payment made *bona fide* should secure her; and the wife ought to pursue her husband's executors to re-employ.

It was REPLIED, That the tenor of the bond put the executrix *in mala fide* to pay without the relict's consent.

The Lords found, That the husband could not lift, nor the debtor pay, the principal sum, without the wife's consent, or re-employing it sufficiently for her behoof; and, therefore, reduced and suspended the decreet for delivery.

Vol. II, Page 556.

1677. *November* 13. THOMAS WILSON *against* GEILES FERGUSON and Her SPOUSE.

THOMAS Wilson pursues Geiles Ferguson, for payment of an account of ale and beer furnished to her by the space of six years; and also her husband, for his interest.

The defender ALLEGED, That the libel was only probable *scripto vel juramento*, by the Act of Parliament declaring all counts to be so probable after three years; and so no article of this account can be sustained, it being three years preceding, to be proven by witnesses.

It was ANSWERED, That the Act of Parliament allows counts to be proven by witnesses, being pursued within three years; which three must be accounted from the last article of the count; and so must not severally relate to every article, but to the account, consisting of more articles.

It was REPLIED, That though the currencies of counts have been found rele-

vant in merchants' accounts, that have books where discharges use to be taken, yet it ought not to be extended to vintners; otherwise all people who have been so furnished may be put to count, though for twenty years past. And there was a practick produced out of Durie, who, in a pursuit by a vintner against a taverner, who had passed from his service unquarrelled; the Lords would not sustain the process to be proven by witnesses, that the ale was tapped by the servant, it being presumed that the vintner received the money by daily and weekly accounts; unless it were proven, by the servant's oath, that the same was resting.

The pursuer DUPLIED, That if this parallel hold, witnesses will be excluded from proving one year's furnishing, as was in that servant's case; which cannot be drawn to the case of another person, where there is no presumption of payment. And the constant decisions of the Lords have sustained a count current probable by witnesses, though it lasted for many more than three years, if pursued within three years after the ending of the account; and that not only to merchants, but to apothecaries, tailors, &c. and writers; upon which all parties have rested secure. It is true, the interval amongst the articles of a merchant's count may be larger than a vintner's count, which is ordinarily weekly, and a merchant's count but yearly furnishing; but, so long as the account is current, it is but one count.

The Lords sustained the account to be proven by witnesses, being pursued within three years after the ending of the count-current.

Vol. II, Page 557.

1677. *November 23.* VANS *against* The LADY BAIRFOORD.

GEORGE Ross, having obtained decreet against the Lady Bairfoord, she suspends, and raises reduction, and craves to be reponed to her oath;—and ALLEGES, That she never received advertisement to compear to depone; whereupon she offers to make faith. Her advocate also disclaimed his compearance, and alleged that the decreet was made up by collusion; and that she and her son, being both called for a debt of her husband's, and both decerned, the compearance might have been only for her son.

It was ANSWERED, That, albeit the Lords do ordinarily repone parties to their oath, when they are holden as confest, and compear not, yet, where they compear, produce writs, and dispute, such parties cannot be reponed; especially in prejudice of singular successors, acquiring *bona fide*, for onerous causes, and resting upon the Lords' decreet *in foro*. Neither can any respect be had to the advocates' disclaiming of their appearance, or dispute; which would evacuate all decreets. But, if any collusion can be proven, it must be *per membra curiæ*, by the Lords or clerks, whose assertions, *ex intervallo*, long after decreets are extracted, will not be received against the same, but the oath of the party only; unless it were in the time of extracting, or immediately after. And, in this case, advocates cannot disclaim their compearance, seeing the decreet bears, "writs produced for the defender;" and, as to the son, there is nothing said for him at all.

The Lords ordained the clerks to be examined upon oath.

Vol. II, Page 563.

1677. *November 27.* ROBERTSONS and FALCONER *against* DUMBAR.

MAUZE and Isobel Robertsons, and Alexander Falconer, husband to Isobel, pursue James Dumbar, messenger, for payment of the debt in a caption, wherewith the messenger had taken the Earl of Mortoun, and suffered him to escape.

The defender ALLEGED Absolvitor; because he had done his duty as messenger, having attached the Earl, and touched him with his messenger's wand, and holden him, and commanded him to go to prison, in his Majesty's name, in obedience to the caption; but he being a person of quality, and very corpulent, he was not able to bear him; but the pursuer being present, and communing with the Earl's good-brother for accommodation, a warrant came, within two hours, by a deliverance, on a bill of suspension, stopping execution: And messengers were never obliged to such diligence, as that they might not keep their prisoners two hours before they were sent to prison. *2do.* The defender offers him to prove, that he having attached the Earl, he was deforced by the Earl, and others in his company, by drawing swords; and yet he waited, in the room and at the door, till the warrant stopping execution came.

The pursuer REPLIED to the first, That whatever latitude there be in the diligence of messengers, as to the time of putting of persons in prison, yet it being in Edinburgh,—where it is known attempts will be made for suspension, and especially where the pursuer urged the messenger presently to incarcerate,—if he might delay, all captions in Edinburgh might be evacuated. And, as to the second defence, of being deforced, *Non relevat*, unless there were such a force as the messengers, with the assistance of the pursuer, could not rationally think to suppress; but it is offered to be proven, that the pursuer had obtained concourse of the town officers, and had with them ten or twelve persons; whereas there were but two with the Earl. *2do.* It is offered to be proven, that the pursuer brought another messenger, who offered, with the same assistance, to put the caption in execution, notwithstanding of any resistance offered; but the defender refused to quit the caption. *3tio. et separatim*, It is offered to be proven that the messenger colluded, and received money from the Earl.

The Lords found, That the messenger being required, by the party, was obliged presently to incarcerate: And found the reply against the resistance relevant, that either another messenger offered to proceed in the caption, having sufficient strength, or that the messenger received money from the Earl: but did forbear to determine that point,—how far a messenger was obliged to proceed when he met with forcible resistance, being assisted with a greater strength.

Vol. II, Page 567.

1678. *January* 11. CAPTAIN DUNDASS *against* LIEUTENANT-GENERAL HOLBURN.

CAPTAIN Dundass pursues Lieutenant-General Holburn for the levy-money of a company levied *in anno* 1648, whereof Holburn was colonel: and each company had a locality; wherein Dundass his locality fell in Selkirk; with whom he had agreed for £40 for each soldier; and that Holburn had uplifted the

levy money, and the free profit of the company: which was sustained relevant. But the question arose as to the manner of probation: The pursuer offered to prove it by the defender's receipts and subscribed accounts with the commissaries or quarter-masters.

The defender ALLEGED, That, by the known custom among soldiers, the staff-officers count for the whole regiment; whereof every inferior officer receives his share without a discharge; and, therefore, it is only probable by his oath, that he did uplift and retain the pursuer's share; otherwise, the counts with commissaries, or quarter-masters, or collectors of shires, might make all considerable officers liable for the pay of their regiments; which were of dangerous consequence now, after thirty years.

The Lords found the foresaid receipts not to infer a necessity to produce discharges; but that, in regard of the custom, soldiers' payment was presumed, unless it had been questioned *de recenti;* and that it was now only probable, by the defender's oath, that he received the levy money and repaid it not.

Vol. II, Page 590.

1678. *January* 16. MAULD *against* LORD and MASTER of BALMERINO.

THE Lord Cowper, standing in the right of the estate of Balmerino in trust, disponed certain lands to James Mauld; and, in special warrandice thereof, granted an annualrent out of other lands: And there being a distress, by non-entry, at Pourie's instance, who obtained decreet for poinding of the ground of the principal land, James Mauld pursues recourse against the warrandice lands.

The defender ALLEGED, No process; because there was no lawful intimation made, by the pursuer to the defender, of Pourie's play, when Pourie's process for poinding of the ground was pursued: In which case the defender had a sufficient defence to exclude Pourie, *viz.* a right belonging to Mrs Mary Ker, proceeding on a sum whereon inhibition was used before Pourie's right; and, if Pourie's process had been intimated in due time, Balmerino would have raised reduction of Pourie's right, upon the inhibition; which, being repeated by way of defence, would have excluded Pourie.

It was ANSWERED, That sufficient intimation had been made; in so far as the dependence of Pourie's process had been verbally intimated to the Lord Balmerino, or the Master, who stands in the fee of the estate; whereupon James Chalmers, advocate, was employed by them, and did take up and return the process, and was never employed by James Mauld. *2do.* After the decreet, a bill of suspension had been given in by Balmerino; wherein Pourie prevailed. The cause was disputed upon the bill; and that because there was no reduction raised by Balmerino upon the inhibition; or, if it was, it was but lately raised, and not yet come to be enrolled.

The defender REPLIED, That, whatever was done upon the bill of suspension, imports not; because the reasons behoved to be instantly verified: but if intimation of the play had been made in due time before the sentence, Balmerino would have had time enough to have raised reduction, and repeated it by way of defence. Neither was a verbal intimation sufficient, without an instrument of judicial intimation; without which parties concern not themselves, and are secure.

The Lords found, That the verbal intimation, though not sufficient alone, yet that Balmerino, being so certiorated, employed an advocate to defend, who appeared, saw, and returned the process,—sufficient: And found it relevant to be proven *scripto vel juramento;* seeing intimations of pleas are ordinary to be made at the bar to the party's ordinary advocate; likeas it was notour that James Chalmers was Balmerino's ordinary advocate.

Vol. II, Page 592.

1678. *January* 17. PEEBLES *against* The LORD ROLLO.

IN a competition betwixt the donatar of a husband's escheat, and the successors of a wife, to whom he had disponed his moveables, for love and favour;

It was ALLEGED for the donatar, That a disposition of moveables, by a husband to a wife, could have no effect against a donatar or creditor of the husband; because, if such dispositions could establish the right of their moveables in the wife's person, the same did recur to the husband *jure mariti:* and, therefore, all diligence of creditors who would affect such moveables, as being in the disposal of a husband, must be preferred; for otherwise creditors might be defrauded by such gratuitous dispositions of husbands to their wives.

The Lords found the disposition to the wife not to exclude the donatar of the husband's escheat, except in so far as concerns clothes and ornaments for her person; which were exempted *à communione.*

Vol. II, Page 593.

1678. *January* 18. The LAIRD and LADY AIRTH *against* The EARL of MONTEITH.

UMQUHILE Captain Bruce having apprised the lands of Airth from the Earl of Monteith, the Earl did ratify the apprising; and the Captain gave a reversion for certain years after the legal. The Lady Airth, daughter and heir to the Captain, and Richard Elphingston of Calderhall, her spouse, pursue a declarator of the expiring of the reversion.

The Earl of Monteith having right from Ker and Shaw, and not as representing his goodsire, ALLEGED, That the Captain's right was satisfied within the time of the legal reversion; at least, before declarator of the expiring thereof; because clauses irritant are ever purgeable by payment or satisfaction before declarator.

It was ANSWERED, That the defence is only relevant as to penal clauses irritant, or temporary reversions, where the granter of the reversion had not a full right before; but here the temporary reversion was merely gratuitous; the Captain having a full right, by an expired apprising, ratified by this debtor; so that the reversion was mere favour, and not penal.

The Lords found the defence only relevant, by satisfaction within the years of the temporary reversion.

Vol. II, Page 595.

1678. *January 22.* HAY *against* The EARL of TWEDDALE.

BY contract of marriage betwixt the deceased Earl of Tweddale and the Earl of Eglintoun's daughter, the heir-male of the marriage was provided to the lands of Drummelzier; and the Earl was obliged to ware and employ 60,000 pounds upon land or annualrent, for the heir-male of the marriage; and it was declared, That the Earl might provide the conquest to what heir he pleased to nominate. Thereafter the Earl purchased the lands of Hercus, from Lawson of Cairnmoor, to himself, his heirs and assignees; but, before infeftment, there is a letter produced, written by the Earl to Cairnmoor, to grant a new procuratory in favours of the Earl and his heirs-male of the marriage, in implement of the contract of marriage; which words are margined in the procuratory, and are not repeated in the infeftment, but are contained in the instrument of resignation; and there are witnesses subscribing to the letter. But, after this infeftment, the Earl grants a disposition of Hercus to his son William and the heirs of his body; which failyieing, to a sister of that marriage; which failyieing, to their mother and her heirs: whereupon no infeftment followed. In which disposition it is declared, That Hercus shall be no part of the 60,000 pounds. But shortly thereafter, the Earl having disponed his estate to the Lord Yester, his eldest son, whom he took obliged to fulfil the contract of marriage with the second lady: in implement whereof, the deceased Earl, as tutor and lawful administrator to his son William, takes a disposition of the lands of Rodono, from his son, for 50,000 pounds; and which bears, that Hercus being acquired for 10,000 pounds, for implement of the contract of marriage, therefore the deceased Earl accepts this in full satisfaction of the 60,000 pounds, and discharges this Earl of his obligement to fulfil the contract, and obliges himself to procure a discharge from William to this Earl. And, after all, the deceased Earl, in his testament, declares Hercus to be disponed for no part of the 60,000 pounds. Drummelzier, as heir of the marriage, pursues for the 60,000 pounds, and annualrents thereof since his father's death, and insists against the Earl of Tweddale, as successor, *titulo lucrativo*, to his father, by a disposition of the estate of Tweddale, after the contract of marriage; and that it might be declared,—That this Earl, both as cautioner and successor, should fulfil the contract, and relieve the heir of the marriage of all debts of his father, to which he would be liable as representing him as heir of the marriage; and thereby the provisions of the contract of marriage would be evacuated;—so that an implement thereof would be an effectual implement.

It was ANSWERED for Tweddale to that member of the declarator, That a lucrative successor could never be liable for debts contracted by his father, after the disposition of the estate to him.

And it being REPLIED, that the contract of marriage was prior, the implement whereof behoved to be *cum effectu;* and if the deceased Earl had been pursued to fulfil, no disposition would have been accepted from him, without purging his debt, anterior to that implement, which would evacuate the same; and therefore the son, as lucrative successor, can be in no better case: This point was not determined, but was settled by a reference, in which Drummelzier got 1000 pounds sterling, and the Earl became obliged to relieve him of all his father's debt. But as to that member, of paying the 60,000 pounds with annualrents,

the defender alleged Absolvitor, because it was already fulfilled by the disposition of Hercus and Rodono, upon which the pursuer's father, as lawful administrator, had employed that sum.

The pursuer ANSWERED, That Hercus could be no part of the implement, because of the disposition thereof to the pursuer, declaring it to be no part of the implement. *2do.* That Rodono ought not to be accepted for 50,000 pounds; because the pursuer's father, who was debtor in the contract of marriage, and lawful administrator, could do no deed prejudicial to the pupil, to evacuate his son's and his own obligement; so that albeit Rodono had been accepted, it could only be for the true worth.

The defender REPLIED, That the disposition of Hercus was false in the date, and so *in totum;* and that it was never delivered, but kept by the father; and therefore while it was in his hand, without resignation or infeftment, it was at his disposal, and he might have cancelled or qualified it as he pleased; which he had done by the posterior disposition of Rodono, declaring Hercus to be a part of the implement: and as to his contrary declaration in his testament, it could operate nothing in relation to heritage.

The Lords having, before answer, ordained either party to adduce probation of the date and delivery of the disposition of Hercus to the pursuer, and of the rental of Rodono, when it was disponed to William, and the rate of such lands, being kirk-lands, now holden of the King, by ancient infeftments, confirmed according to the ordinary rate of such lands in that place of the country; and the probation being now closed, the Lords advised the same, and found that it was not proven, that the disposition of Hercus to the pursuer was delivered to any person to his behoof, but detained by the father; and that though the want of delivery would not have prejudged it,—the father's custody being the son's custody,—yet, while it remained in the father's custody, without any further progress, he might annul or alter it at his pleasure; and that he had altered it by the posterior disposition of Rodono, and therefore found it to be an implement of the 60,000 pounds; and so found no necessity to advise the testimonies as to the date, or consider what effect the first disposition on Cairnemoor's resignation would have. But, by the probation adduced for the worth of Rodono, the Lords found that it was not worth the 50,000 pounds: but that by the probation, and in consideration that the Earl had no right to the teinds, but that there had been an old use of payment of 100 pounds of vicarage to the minister, without any valuation,—the pursuer's witnesses having proven that the ordinary rate of such lands was 15 years' purchase, and the Earl's witnesses having proven that 18 years' purchase had been gotten for such like lands,—the Lords determined the price to be 15 years' purchase, both for stock and teind; the Earl warranting the teind against any other right or burden already imposed, except 100 pounds payable to the minister.

In this process there was a declinator given in by Drummelzier against Newbyth, as being a witness adduced by Tweddale, anent the date of the disposition of Hercus, and so could not be both judge and witness in the cause. The Lords found, that Newbyth could not judge as to that point for which he was adduced witness, but might judge in any other point in the cause. But thereafter, upon a bill, the Lords made the price 17 years' purchase, Tweddale giving real warrandice for the teind by infeftment.

Vol. II, Page 596.

1678. *February* 13. BLAICKWOOD *against* ALEXANDER.

WILLIAM Blaickwood, as having right, by disposition, to certain household-plenishing from Archibald Edgar, pursues Robert Alexander, for delivery thereof;—

Who ALLEGED Absolvitor, because this plenishing being in Archibald Edgar's house, wherein he was tenant to the defender, he had a tacit hypothec therein, for the maill of his house.

The Pursuer ANSWERED, That this hypothec cannot reach further than a term, or year's maill, and doth not hinder the tenant to dispose of his goods in the house; much less can it reach the goods of any other, which even in an express impignoration *a non suo domino* could not affect.

The defender REPLIED, That this plenishing, being the plenishing of the house, is liable for the maill to whomsoever it belongs. *2do.* This did once belong to the tenant, and was in the house, and therefore remains *sub nexo hypothecæ*, so long as they are continued in the house. *3tio.* The pursuer's disposition, with the instrument of possession, doth not transmit the property of the goods, except there had been natural possession; but this disposition being *retenta possessione* by the space of two years, till the defunct's death, law presumes the same to be simulate.

The pursuer DUPLIED, That these goods being disponed to him before any maill was due, he was thereby proprietor; and the hypothec could not extend to any goods whereof the tenant ceases to be proprietor before the maills be due. Neither doth retention of possession infer simulation, except in the case of escheat-goods, and that by the special statute, 1592. Neither did the disponer's making use thereof, infer simulation, or that the property was returned to the disponer; the pursuer's title not being merely presumptive by possession, but positive by writ, and must require a positive probation that the goods were re-disponed.

The Lords found, That the disposition and instrument of delivery did instruct the property of the goods to the pursuer; and that thereby they were not liable to the hypothec of any posterior maills; and that the retention of possession, in this case, did not infer simulation; neither making of some use of the plenishing, without disposing thereof, did infer recovery of the property, without a positive probation: and therefore decerned the goods to be delivered to the pursuer.

Vol. II, Page 612.

1678. *February* 14. CALDERWOOD *against* ANGUS.

BY charter-party, James Angus became obliged to carry a loading from Leith to Burdeaux, for David Calderwood, with all convenient diligence: whereupon Calderwood pursues Angus before the Admiral for damage upon his delay, and failing in implement of his contract; offering to prove, that he had loaded the ship, by the 20th day of December, with herring and other goods;—that he had often desired the skipper to sail, the wind being fair; and that he came from

his own house, from Edinburgh to Leith, and staid in the defender's house, being to go aboard himself: and that, upon the 2d day of January, he took protest against the skipper for damage, by the loss of his market, especially the herring; which, if they were not landed before Lent, would lose the market.

The defender ANSWERED, That, after the protest, he had used all diligence, and made sail the next day, but was stopped by storm until the 13th day of January, when the pursuer left him, and cited him before the Admiral. Which defence the Admiral thought relevant.

Whereupon the pursuer raised advocation on these reasons: *first*, That the Admiral did wrong, in not sustaining the libel upon the delay before the protest; for though protest may be taken *ad majorem evidentiam*, yet the defender was *in mora et culpa* in not using diligence, when he was first required and when other ships went out. *2do.* That he ought to prefer the pursuer to the probation that the wind was fair; at least given a conjunct probation as to the wind and weather.

The defender ANSWERED, that, in this contract, there being no term nor lydays, *ubi dies interpellat pro homine*, he was not *in mora* until interpellation; which overly words cannot infer, but must be solemn by instrument. Neither was it competent to the Admiral to give a conjunct probation, which was only *ex nobili officio*. And that there was a storm, is much more positive and pregnant than the being of fair weather.

The Lords found, that interpellation was requisite by instrument, and found no delay till then: and found that the Admiral did no wrong therein, or in sustaining the defence: And therefore remitted the cause.

Vol. II, Page 613.

1678. *February* 21. OLIPHANT *against* COWPER.

THE tutor of Stormont having drawn a precept upon Cowper to pay to Kinfauns 800 merks, Kinfauns assigns the precept to Laurence Oliphant; who thereupon pursues Gilbert Cowper for payment, who alleged compensation upon debts due by the cedent before the assignation; which was found relevant, and an act extracted: which being called, the defender produced some writs for proving the cedent's debts; the pursuer was content to allow what was produced, and craved decreet for the rest.

The defender ALLEGED, That the Ordinary could not advise the writs produced for satisfying the desire of [the] act; but the same behoved to be advised by the Lords, proven or not proven, according to the ancient and inviolable custom; for though the Ordinary may refuse to admit writs not relating to the cause, when offered, to stop circumduction of the term, yet if that which is proper be offered, he cannot advise whether it proves in the whole or in part; which is a great security to the lieges, and hath this advantage to defenders,—that, before the probation come in to be advised by the course of the roll, he may produce further.

The Lords found, That the Ordinary could not advise the production; but declared,—that if the defender would not consent to a decreet for the superplus, but delay, the same should be *cum onere expensarum*.

Vol. II, Page 617.

1678. *February 27.* LAMONT *against* BOSWEL.

BY charter-party Colvil Lamont was obliged, upon freight, to carry his ship from Kirkaldy to Queensbridge, and back again; for which Henry Boswel was obliged to pay him therefor 800 merks: who being charged therefor, he suspended on this reason,—That the skipper, in his voyage to Queensbridge, being near Milstrand, and staying some days there, the suspender went ashore, sold a part of his goods at good rates, and did require the skipper to disload; which he refused; and therefore he must deduce the damage.

The skipper ANSWERED, That, by his charter-party, he was only obliged to go to Queensbridge; and, that breaking bulk at Milstrand without an entry, he might forefault the ship.

The suspender REPLIED, That this bargain, by location and conduction, being *contractus bonæ fidei*, the skipper could not refuse to set into any safe harbour in the way to Queensbridge, or to disload any parcel at sea,—which the suspender offered to receive by boat several leagues from land; and there is no hazard to sell a parcel of goods in one dominion, and the rest in another; albeit, where the cargo is direct to any dominion, bulk may not be broken there.

The Lords found, The skipper ought to have disloaded the foresaid parcel at sea; and therefore ought to deduce the damage.

Vol. II, Page 620.

1678. *July 2.* HENRY YOUNG *against* PEARSON.

HENRY Young pursues reduction of a decreet-arbitral betwixt him and Pearsons, bearing a general submission, according to claims, and particularly anent the payment of the lands of Muirhaugh. The reason of reduction is upon iniquity, because the disposition of the lands of Muirhaugh bore expressly the payment of the price, and yet the arbiters decerned the pursuer to pay a sum affecting a part of the lands; which decreet bears this clause,—"That, by instruments and witnesses adduced, it was proven that the pursuer promised to satisfy that burden, and that he acknowledged the same before the arbiters." And though there was an instrument taken upon the promise, yet, by the laws of this kingdom, promises are not probable by witnesses or instruments, or by the assertion of the arbiters to justify themselves; and, therefore, the arbiters did wrongously take from the pursuer that which the law of the kingdom had given him.

It was ANSWERED, That, by the nature of a submission to arbiters, they may proceed *secundum bonum et æquum*, and are not understood to do iniquity by municipal laws, in relation to the formalities or penalties thereby introduced; and, therefore, they might justly sustain a promise, which is binding by the law of God, and action only refused against the negligence of parties who take no writ, that witnesses shall not be admitted; and, therefore, the arbiters might sustain the promise, as they might take off a penalty, or certification, or the expiring of a legal, or a clause irritant; though Judges, who must proceed according to the law of the land, could not do it.

The Lords sustained the decreet-arbitral; the defender, in fortification there-

of proving, by the arbiters' oaths, that they did examine the witnesses in the instrument bearing the promise, upon oath, and that they did prove the promise, or that the party did acknowledge the same before the arbiters.

Vol. II, Page 626.

1678. *July* 2. ALEXANDER YOUNG, Supplicant.

ALEXANDER Young gave in a bill of suspension, bearing, That he had a protection from the King, upon payment of annualrents; and that he offered the annualrent to the messenger, and yet he put him in prison by caption: and offered yet the annualrent, and craved liberty.

The Lords refused the bill, in respect that the protection being conditional, he paying his annualrents, that condition not being fulfilled before incarceration, the protection had no effect; neither was the messenger a competent judge to cognosce upon annualrents, or receive the same; nor did this party produce a discharge of the last term's annualrent; and, therefore, the Lords would not suspend the principal sum, upon consignation of the annualrent, without other reasons against the principal sum.

Vol. II, Page 626.

1678. *July* 4. CAPTAIN HUME *against* ANNA LIVINGSTON.

CAPTAIN Hume, having confirmed himself executor to his mother, and confirmed a necklace of pearl, pursues Anna Livingston, and John Acheson her husband, for delivery thereof.

The defender ALLEGED, Absolvitor; because, in moveables, property is presumed from possession; and none are put further to instruct their author's right or their own. *Ita est*, the defender hath possessed this necklace for nine or ten years.

It was answered for the pursuer, That, albeit possession infer a right of property in moveables, yet that is but presumptive, and admits of contrary probation by the possessor's oath; or otherwise, by condescending how the proprietor ceased to possess, either by stealing, straying, or by the death of the proprietor; as, in this case, the pursuer, being a soldier abroad, offers to prove that this necklace was in his mother's possession in the time of his mother's sickness whereof she died, and so could not be transmitted by any but by an executor confirmed to her. And, albeit the pursuer, being absent when his mother died, suffered his sister, who was with her mother when she died, to keep this necklace till she died; at which time the defender, being her relation, and with her, got the necklace in her hands; but neither his sister nor the defender could have any right thereto.

It was REPLIED, That the defender's sister got this necklace in gift from her mother, and did wear the same in her mother's life; and, therefore, seeing the sister might have gifted the same, the defender is obliged to instruct no farther than possession: and yet, *ex abundante*, she is content to depone she got the same from the pursuer's sister; which is sufficient to fortify the presumption of

possession by the pursuer's sister ten years before her death, and the defender, several years after her death.

The Lords found the pursuer's answer relevant, *viz.* that this necklace was in his mother's possession the time of her death; unless the defender offer to prove that the pursuer's sister wore this necklace before her mother's death, or the sickness whereof she died: at which time, no gift or legacy without writ were sufficient; seeing the necklace, by the acknowledgment of both parties, exceeded £100 Scots.

Vol. II, Page 627.

1678. *July* 20. ALEXANDER FALCONER *against* JAMES DUMBAR.

ALEXANDER Falconer having employed James Dumbar, messenger, to execute a caption against the Earl of Morton,—the Lords sustained this defence, That the messenger was resisted after he had touched the Earl with his wand; the Earl and several others having drawn their swords, and stood in that posture till a warrant came from some of the Lords to sist execution: and also this reply, That the pursuer having required the messenger to execute his office; and, if he would not, having required his caption to be executed by another messenger, who was present, and offered to put it in execution, and was assisted with sufficient force to that effect.

The defender proved, that after he had touched the Earl, and commanded him to prison, in the king's name, and took him by the arm, to lift him from his chair, the Earl and several others drew their swords, and continued in that posture till the stop came.

The pursuer also proved, that he required the caption; and that another present offered to put it in execution; and that the messengers had two town-officers and ten more to assist, Falconer himself being present: and that the messenger at last gave the letters to the other messenger; but the assistance were gone. Whereupon, the question arose, whether the messenger should be decerned in the sum or not; seeing he either protracted till the stop came, or failed in his duty, having sufficient assistance; but the defender proved, that neither the town-officers, nor any of the assisters, had arms.

The Lords found the resistances proven; but found, that neither the defender nor the other messenger had sufficient assistance against armed men with drawn swords, the messenger and assistance having no arms: and that the creditor being present, might have called to the magistrates of Edinburgh for assistance of their halberts or guards; which the messenger had been obliged to do, if the party had not been present: therefore they assoilyied the messenger.

Vol. II, Page 638.

1678. *July* 26. GORDON of SETON *against* CRUICKSHANK.

GORDON of Seton having raised a reduction of a decreet-arbitral betwixt him and Cruickshank, as *ultra vires*, being pronounced after the day within which

the decreet was to be pronounced, without prorogation;—the defender ALLEGED Absolvitor; because, *pendente processu*, the pursuer had invaded him, by beating, wounding, &c. conform to the Act of Parliament made thereanent; whereby the pursuer *cadet causa*.

The Lords sustained the defence.

Vol. II, Page 643.

1678. *November* 16. The LAIRD of CUNNINGHAME-HEAD *against* The EARL of LOWDON.

CUNNINGHAME-HEAD,—having had a joint right to the estate of Lowdon, by the first apprising thereof, at the instance of Mr Livingstoun, which is now expired,—did obtain decreet, against the tenants, for his share of every tenant's duty, effeiring to his share of the principal sum in Livingstoun's apprising. There is a bill of suspension of the decreet given in; and the cause ordained to be discussed upon the bill.

It was ALLEGED for the tenants, That they were or might be distressed by several rights preferable to Mr Livingstoun's; which were now produced.

It was ANSWERED, That this decreet proceeded upon suspension of multiplepoinding, whereupon the parties now competing were cited, and did not appear; and, therefore, they cannot now be heard in the second instance, in respect of the Act of Parliament anent doublepoinding.

It was REPLIED, That that Act was only for actions of doublepoinding; but not for suspensions, which must be instantly verified: and, therefore, though the parties omit to produce, they cannot be excluded to produce again in a second doublepoinding, either by way of action or suspension.

The Lords found, That the Act anent doublepoinding did not extend to suspensions of doublepoindings; and, therefore, allowed those who were cited in the first suspension of doublepoinding, and produced not, to produce now in the second suspension, and to compete therein.

Vol. II, Page 646.

1678. *November* 27. RUSSEL *against* RUSSEL.

THERE being mutual actions of molestations between Russels and Russels, in relation to lands lying upon the borders of the shires of Lanerk and Linlithgow, before the Sheriff of Lanerk; the Sheriff appointed a perambulation, and named an inquest; and, at the first meeting of the perambulation, prorogated the same to a diet. Some months after, Russel in Linlithgow-shire raised advocation on these reasons:—1*mo*. That, by express Act of Parliament, Molestations betwixt heritors of lands in different shires are ordained to be by the Lords, or by indifferent persons commissioned by them; and the inquests meeting on the ground, their diets are not to be continued beyond eight days; whereas, here they were continued for some months. 2*do*. The sheriff of Lanerk is suspected as interested to enlarge his own jurisdiction; for, if the land in question be found to

be part and pertinent of the tenement belonging to the Russels in Lanerkshire, it will be in the sheriff of Lanerk's jurisdiction.

It was ANSWERED to the first, That *primus actus judicii est judicis approbatorius*:—both parties having pursued before the sheriff of Lanerk, cannot now decline him as incompetent. And, as to the prorogation of the inquest, it was of consent of both parties, as the Act bears. Neither is a reason of suspicion competent after an Act of Perambulation, and an inquest chosen out of the lists offered by both parties; which makes litiscontestation in perambulations: after which nothing but iniquity can advocate.

It was REPLIED, That though the pursuer of the advocation did compear before the sheriff of Lanerk, yet the Act bears,—That he protested that he was not under his jurisdiction, and did proceed under that protestation: neither can the sheriff's act, bearing his consent, prove, unless it had been subscribed.

It was DUPLIED, That proponing defences, or offering members of inquest, and compearing at the diet of inquest, are all acts approbatory of the sheriff's jurisdiction; and any protestation in the contrary, is inconsistent, *et contraria facto*: Neither is there necessity to subscribe any consent in matters ordinary incident in processes; as assigning and ordaining of diets.

The Lords repelled the first reason; and found the appearance and insisting excluded declinator, notwithstanding of any protestation in the contrary: and found the consent to the continuing the diets without writ sufficiently proven, by the Act of the Court, without consent of the party; and that, after nomination of the inquest upon the lists of both parties, suspicion of the judge was not competent.

Vol. II, Page 647.

1678. *November* 30. GRANT of CORIMONY *against* M'KENZIE of SUDDY.

GRANT of Corimony having obtained a decreet of spuilyie against Grahame of Drynie and M'Kenzie of Suddy, they suspend, and raise reduction, on this reason:—

That, by inspection of the testimonies, it would appear that there was no probation of any part of the spuilyie, against them, and no probation of a spuilyie of a mare against any; and therefore the decreet is null for want of probation.

The charger ANSWERED, That the reason is no ways competent to be founded upon probation by witnesses; which, by the inviolable custom of this kingdom, are never to be published and seen to any party; but are to be sealed after they are taken, and sealed after they are advised: And, therefore, the Lords suffer not advocates to allege *super dictis testium*; which, by our law, are *partes judicis*, and the trust of the Lords: and, therefore, can be advised only by the Lords *in præsentia*; albeit the most important writs produced, before conclusion of the cause, may be determined by the Ordinary. And this custom of closing of testimonies is founded upon solid grounds and expediency, which immemorial experience hath confirmed: that the debating of the importance of every testimony, whereof, perhaps, a hundred may be in one cause, would make pleas endless; and the publishing thereof would beget animosities against witnesses, and weaken the freedom of their depositions, when powerful persons, or their friends,

were concerned: and the closing of witnesses is a considerable part of our law, by immemorial custom; which nothing can alter but a statute in Parliament. It is true that there is an exception in improbations, the consequence whereof is capital: for, upon the decreets of improbations, finding a writ forged, and a party actor, or accessory to the forgery, the justices and assizes do currently proceed to find the party guilty, without further proof: But there is no other exception in civil cases, *et exceptio firmat regulam in non exceptis:* neither have the Lords, after advising of testimonies, upon any importunity, readvised the same; knowing that they would ordinarily be put to double or frequent advisings. But, after sentence extracted, none did ever attempt to allege a decreet of the Lords null, because the testimonies of the witnesses did not prove; which could neither have ground nor effect without publication of the testimonies: for the Lords did never regard the pretence of parties, that the witnesses had told them what was their testimonies; they being ready to gratify either party by such extrajudicial assertions.

The suspenders ANSWERED, That albeit, in the first instance, the Lords would not allow publication of testimonies, or readvise the same, yet they ought to do the same in the second instance: as they will not stop process upon reprobators, yet they will reduce their most solemn decreets upon reprobators: they will also reduce their decreets upon nullities, for want of probation: And there is reason they should revise the testimonies upon reduction; because, for want of publication of testimonies in the first instance, decreets founded thereon are, in effect, in absence *parte inaudita.* And, for the inconvenience of multiplying pleas, the Lords may let the first decreet take effect, without granting suspension; but ought to admit of reduction: for,—seeing sentences are not subscribed by the President, but are mere minutes of the clerk upon the process, which the Lords do not nor cannot know how or when they write them,—parties, without reflecting upon the justice, or trust of the Lords, but only upon the faithfulness of the clerks, may well desire the Lords to revise the probation. And, in this case, Mr John Hay, who was clerk, and who was accused for malversation in this process, was never acquitted, but did resile therefrom.

It was REPLIED, That this pretence is, under the name of a clerk, to strike at the justice and trust of the Lords, and the ancient law of closing of testimonies; for, if it be allowed, all the decreets of Session that ever were, or can be, may be drawn in question, and there can be no ultimate sentence by probation of witnesses; for still that reason remains, The clerk might have made up the sentence, produced false testimonies, or suppressed the true, or read otherwise than was written, or write otherwise than was ordered. Therefore, such improbable possibilities, which wound the common confidence in all judicatures and their servants, are neither relevant nor presumed; but, on the contrary, it is a received principle in all nations, *res judicata pro veritate habetur:* and parties have all the rational remeid that can conveniently be, before sentence; for they are called *in præsentia* at advising of causes, and, in their presence, the clerk relates the state of the process, and what is adduced for probation, and, if they suspect him, they may desire him to be special upon the number and names of the witnesses, and, if any be omitted to be presented who were examined, they will be heard thereupon. And, albeit the Lords reduce their own decreets upon nullity, when it appears by the decreet, it doth not mention all the points admitted to probation to have been proven, by expressing the manner of probation; when by

oath, by writ, or witnesses; and bearing the points to be sufficiently proven by the writs produced, which are expressed in the production, or by the oath of the party, or by the testimony of famous witnesses, if these be omitted; which pass in course, and are not particularly advised by the Lords:—but that infers nothing as to the particulars advised by the Lords; for albeit, when parties are absent, the clerks give sentence, of course, in matters clear, or in others do report the libel to the Lords, who give their interlocutor, without full inspection of the libel, or probation by writ, and will, in the second instance, hear parties who were absent in the first, upon the relevancy, or probation by writ or oath, yet never upon that point, whether the testimonies, even in absence, did prove, seeing these cannot be published. And therefore the Lords do narrowly advert thereto in all cases: as this very day, in a contravention inferred by the violence of a son in the family, the Lords would not admit a contrary probation, that he was a schoolmaster *extra familiam*: nor would they reëxamine the witnesses adduced, what they meant by being in the family, whether he was only in the house for the time, or if he resided with his father; seeing they bore, that he was in his father's family and household.

The Lords found the reason of reduction, That the testimonies adduced proved not, was not competent; and therefore would not revise nor reconsider the testimonies, but adhered to the decreet, and found the letters orderly proceeded.—[*See page* 237.] *Vol. II, Page* 650.

1678. *December* 6. Mr William Weir *against* Edward Ruthven.

Mr William Weir, as assignee, by Patrick Ker, to a bond granted by the deceased Earl of Bramfoord, of 5000 merks, pursues a declarator against Edward Ruthven, that the Earl having been forefault during the troubles, his forefaulture was rescinded, and his estate established in the person of Edward Ruthven, his grandchild, by his eldest daughter the Lady Forrester; that therefore the estate of the Earl should be affected with this debt, by apprising or adjudication.

The defender alleged Absolvitor; because, by a special Act of Parliament, his grandfather's estate was established in him, without mention of his debt, so that, in effect, he was made donatar to his grandfather's forefaulture; and it is sure, the king or his donatar is liable for no debt, unless it had been perfected by infeftment or confirmation from the king.

The pursuer answered, That there was no gift of forefaulture, which could only be given by the king. But it is clear, by the Act, that the Earl was restored, not by way of grace, but by justice, as having been unjustly forefault for those acts which he did by the king's command, as a loyal subject. And though the Parliament, by a special Act, qualifying the restitution, to preserve the Earl's memory and estate, which would have fallen to his two daughters, and settled the same in the person of Edward, his grandchild, and ordained him to take the name of Ruthven; yet the settling of an estate in this manner, extending both to the Earl's real and personal estate, can never be understood with exclusion of his debt, unless it had been so expressed, it being contrary to material justice: But the settling of an estate being *nomen universitatis*, not by way of gift, but by way of justice, must be understood *cum suo onere*.

Which the Lords sustained, and found that his estate might be affected with his debt. *Vol. II, Page 652.*

1678. *December* 6. JOHN LAW *against* MARY SMITH and FERREIS.

JOHN Law having charged, upon a decreet of the bailies, against Mary Smith his taverner, and Ferreis, her cautioner; the cautioner suspends, on this reason, That, by the taverner's count-book, written with the charger's hand, there are several sums not allowed to her in this decreet: and that, at her removing, she left a quantity of wine, which was gauged by two gaugers, and yet it was referred to the charger's oath, the quantity and value of the wine; which was probable by gaugers.

The charger ANSWERED, That he opponed this decreet *in foro*, wherein there is compearance both for the taverner and cautioner, who was not only cited at first, but thereafter cited personally, to hear sentence.

It was REPLIED, That the decreet mentions no warrant for the procurator, nor any writ produced for him that might infer warrant.

The Lords admitted the allegeance for the cautioner, unless it were instructed, by his oath, that he gave the procurator warrant to compear for him.

Vol. II, Page 654.

1678. *December* 11. GRANT of CORIMONY *against* MACKENZIE of SUDDIE.

[*See page* 236.]

IN a suspension and reduction, at the instance of Mackenzie of Suddie, and Grahame of Drynie, against Grant of Corimony, of a decreet of spuilyie pronounced by the Lords, upon probation by witnesses, which is before mentioned, debated and decided upon the 30th day of November last: It was further alleged, for Mackenzie of Suddie, that the foresaid decreet, as to him, was in absence: for, though the process was returned by Mr Roderick Mackenzie, junior, indefinitely for the defenders, yet it is offered to be proven by his oath, and he hath already given his declaration, that he was never employed nor informed by Suddie; and therefore, being to him as a decreet in absence, the Lord sought again to consider the testimonies: by which it would appear, that there was not any thing proven against him.

It was ANSWERED, 1*mo*. That when an advocate doth return a process for the defenders, if his oath or declaration may loose that, it would insecure all the decreets *in foro*: for though that hath been sometimes sustained before subscribed returns, when it depends merely upon the clerk to mark for whom advocates compeared, yet it neither hath, nor can be admitted, since advocates have been accustomed to subscribe the returns of processes, and so may, by the return, declare for whom they compear: but when it is indefinite for the defenders, it must be for all or none of them. *2do*. Though the decreet had been without all compearance,—the spuilyie being proven by witnesses,—there can never be

a reason sustained, that it was not proven without publication of the testimonies, and without redarguing the Lords with iniquity. And therefore, though, in decreets in absence, defenders may be heard when the probation was by writs, which are always published, and not so accurately considered in absence; or though the party absent may propone a defence eliding the libel, though proven: yet, it being the Lords' sole trust to advise probation by witnesses with close doors, without publication or dispute upon the testimonies, wherein they use a like accuracy in all cases, seeing the parties are not to know what are in the same testimonies; therefore they can sustain no reasons against the probation by witnesses, even in decreets in absence.

The Lords repelled both these reasons, and adhered to the decreet, and found the letters orderly proceeded.

Vol. II, Page 656.

1678. *December* 17. SIR ALEXANDER HOME *against* MR PATRICK HOME.

UMQUHILE Lord Rentoun, Justice-Clerk, upon consideration of the indisposition and weakness of his eldest son, Sir Alexander Hume, granted a tack to his second son, Mr Patrick, of his whole estate, for payment of an annuity to Sir Alexander for his aliment, and the rest of the rents to the creditors: Whereupon there being a connt and reckoning betwixt Sir Alexander and Mr Patrick, Mr Patrick proponed a total defence,—That he had the sole right to the estate of Rentoun, by a disposition granted, by Sir Alexander to Frank Stuart, of the lordship of Coldinghame, comprehending the barony of Rentoun; by virtue of an apprising of the said barony of Coldinghame, comprehending as said is; and for all other right, title, and interest the said Sir Alexander had to the said barony of Coldinghame, comprehending the said lands of Rentoun and others; or to any part thereof, in any manner of way: and to which disposition the said Frank Stuart had made the said Mr Patrick Hume his assignee; whereby Sir Alexander was excluded from any interest he had in the lands of Rentoun, any manner of way.

Sir Alexander having raised reduction and declarator, that the foresaid disposition granted by him, could not be extended to the property of his own estate of Rentoun, but only in so far as it was comprehended as a part of the barony of Coldinghame, which was apprised upon a bond granted by the apparent heir of Coldinghame,—to the effect, that, without entering heir, he might attain his predecessor's estate; which apprising was deduced in the name of Sir Alexander, his nearest cousin to his own behoof, and he dying, the said Frank Stuart became nearest apparent heir; and therefore Sir Alexander, according to his trust, did dispone the apprising to Frank. And as to the clause, "for all other right," it is no part of the dispositive clause, but only in the procuratory of resignation; and must either be the error or fraud of the framer of the disposition, that the said clause was adjected, omitting the words that rationally should have followed, *viz.* "by virtue of the said apprising," which at length is narrated, and only disponed.

The Lords, before answer, having ordained Frank Stuart, the writer, and witnesses inserted to be examined, how this disposition was procured, Frank deponed, That it was delivered to him by John Bannatine, one of the witnesses in-

serted; and that there was no antecedent communing about it: and Bannatine deponed, That a mean servant of the Justice-Clerk gave him the disposition as now it is subscribed, and desired him to carry it to Sir Alexander, which he did; and Sir Alexander subscribed the same, and gave it to him to be delivered to Frank Stuart, which he did accordingly; and that nothing was expressed by either party what their intention or meaning was; neither yet what was meant by the assignation by Frank Stuart to Mr Patrick.

The Lords found, That the clause "for all other right," &c. not being in the dispositive clause; and that it did not appear who was the framer of the disposition, or by whose order, (the writer thereof, who was the other witness, being dead;) and that Mr Patrick, acting by a tack, acknowledged Sir Alexander's right of property: that therefore the disposition could not be extended to the property of the estate of Rentoun, but only to the superiority, or the feu-duty thereof; as having been holden of the Abbacy of Coldinghame, erected in a temporal lordship to Frank Stuart's predecessors; and comprehended in the said lordship as a part of the vassalage thereof, and as no part of the property.

Vol. II. Page 658.

1679. *January* 8. CREDITORS of EAST-BARNS *against* The EXECUTORS thereof.

INGLIS of East-barns did grant an infeftment to Patrick, his eldest son, of his estate, bearing, for relief of debts,—wherein his son was cautioner, conform to an inventory: whereupon the son was infeft in February; and, in December thereafter, he did infeft his wife in an annualrent out of that same estate, in place of a provision of a contract of marriage. Whereupon she craved preference: because both infeftments being base, hers, though posterior, was peferable; because, being for implement of a contract of marriage, it requires no other possession but the husband's, and so was valid from its date: whereas the son's infeftment was clad with no possession, till the ladies' infeftment; at least any possession he had was but simulate,—he being unmarried, with his father in the family,—and got only a simulate delivery of the goods on the mains, which was ploughed, and a part of it sown by the father. *2do.* The son's infeftment was fraudulent, without an adequate cause onerous; in prejudice of the lady, who is an anterior creditor by her contract of marriage.

It was ANSWERED for the creditors, That they had proven possession in all that could be attained by the son's right, *viz.* by a real delivery of the possession of the mains, and all the goods upon it; and the father, being a beadle, never meddled thereafter, though he lived two years; but the son bought plough, oxen, seed, and paid the servants' fees. All which the Lords found proven. And the question arising, whether the possession of the mains would extend to validate the infeftment as to the rest of the estate,—

The Lords found, That it would validate the same, in so far as might be extended to the lands in the same infeftment with the mains; and, as to the fraudulency of the son's right, the creditors offered to prove, that it was for a cause onerous, equivalent to the worth of the land. But the question arising, that, if the cause onerous were not equivalent, whether the son's infeftment should be sustained and preferred, in so far as the cause onerous was instructed,—

The Lords did sustain the same *pro tanto ;* and ordained the creditors to have preference to so much of the estate as they would choice, equivalent to the sums : that the lady's executors might have access to the rest.

Vol. II, Page 665.

1679. *January* 9. ALEXANDER OGILVIE *against* OGILVIE of LOGIE.

ALEXANDER Ogilvie pursues Ogilvie of Logie, alleging, That he, being in terms of marriage with Helen Ogilvie, Logie's sister, he encouraged the pursuer to insist, and told him that his sister had a jointure, and that he was owing her 1000 merks by bond ; so, having advised him to go to Edinburgh for a warrant to be married, without proclamation,—in his absence he procured from his sister the retirement of the bond, and, in place thereof, did offer her a bond to her daughter by the first marriage :—and, therefore, concluding that he ought to renew the bond to the pursuer, as before.

The defender ALLEGED, That the libel was not relevant, because a wife is only incapacited to do deeds prejudicial to her husband, after proclamation of the marriage ; and though that should be extended to the time of the contract of marriage, yet here there was no contract of marriage. And, though the defender had said he was owing his sister 1000 merks, yet, the pursuer having made no contract, he went on upon his own hazard. And the sum in question being heritable, he could have no right thereto *jure mariti*, but to the annual during the marriage. But, before either contract or proclamation, the woman was free, and might have gifted the sum to whom she pleased.

The pursuer ANSWERED, That, before contract or proclamation, though the woman's disposition could not be quarrelled, as in prejudice of the husband, simply ; yet where fraud is admixed, by inducing the man to marry on expectation of the sum, and, *medio tempore*, evacuating the same, that makes him liable to repair the damage occurring *ex propria fraude*.

The Lords would only sustain the summons and reply, in these terms,—that the marriage was agreed upon, the defender being present, and this sum agreed to be a part of the tocher ; and that, after the said agreement, he had induced the woman to give up the bond.

Vol. II, Page 667.

1679. *January* 15. MR PATRICK REID *against* JAMES WOOD.

MR Patrick Reid, as assignee to a decreet against James Wood, having charged him thereupon, he suspended on double-poinding ; wherein Mr Patrick was preferred, and a decreet extracted. He suspended again, and a second decreet of suspension was extracted ; and now he raises reduction and declarator, and insists on this reason,—that the last decreet was unwarrantably extracted, there being a stop by deliverance of the Lords upon a bill.

It was ANSWERED, That the pretence of any stop cannot recal any decreet, unless, *de recenti*, at the time of the extracting, it had been complained of, that

the clerk had extracted, notwithstanding of a stop in his hand. But if Wood himself had obtained a stop, and did not deliver it to the clerk, it can be no ground of reduction; and, though he did, it can be no ground to quarrel the decreet, except *de recenti:* for the putting on, or taking off of such stops, being no material interlocutors, are never mentioned in decreets; and if, upon the pretence thereof, decreets should be reduced *ex intervallo*, these not being kept as warrants of the decreet, none could be secure. *2do.* Wood has given a bond of corroboration, bearing expressly, That, in corroboration of the decreet, he obliges him to pay the sums decerned;—and so can never quarrel the decreet upon any ground before the corroboration.

It was REPLIED, That the corroboration was no voluntary deed, but was to shun caption; and, if the decreet was unwarrantably extracted, it was not a lawful but unwarrantable violence, to take the party with caption. And it was found, in the case of Thomas Rue against Andrew Houston, upon the 3d of July, 1668, That the giving a bond by a party taken with caption, for the debt of the horning, being without abatement, was no transaction, nor hindered the debtor to suspend and reduce the debt in the horning, and the new bond in consequence; in the same way as, if payment had been actually made upon distress, the same might be repeated, if the decreet were reduced.

It was DUPLIED, That though a simple bond of borrowed money, given for satisfying of a decreet upon caption, and obtaining a discharge of the debt, did not hinder repetition upon quarrelling the decreet; yet that never was extended to a bond granted in corroboration of the decreet, which has the same effect as if the grounds of quarrelling were repeated and renounced.

The Lords repelled the reasons of reduction, and would not stop the execution: But there being in the same summons a declarator,—that the debt contained in the decreet was originally due to Andrew Balfour; and Wood having assignation to a debt due by Balfour, might affect this sum, being conveyed by Balfour, to Reid his son-in-law, without a cause onerous;—

It was TRIPLIED, That Reid had deponed it was for a cause onerous, *viz.* for employing a sum which Balfour was obliged, by his contract of marriage, to employ for the heirs of the marriage; and whereof Reid's wife was the heir; and for the sums advanced to Balfour for his entertainment in prison, and for his funeral charges.

The Lords sustained the declarator; and found the obligement to employ, no sufficient cause in prejudice of a creditor of the father: and found the other causes ought to be instructed otherwise than by Reid's oath.

Vol. II, Page 671.

1679. *January* 15. BROWN of NUNTOUN, &c. *against* The TOWN of KIRKCUDBRIGHT.

IN a declarator of the right of a salmon-fishing on the Water of Cree, claimed by the town of Kirkcudbright, and Brown of Nuntoun, with concourse of the Bishop of Galloway, as superior,—probation of possession and interruption being allowed *hinc inde*,—Brown adduced certain witnesses: and against one it

was objected,—that he was Brown's good-brother, having married his sister; and against another, that he was his cousin-german.

It was ANSWERED to the first,—That the affinity being by Brown's sister, she is long since dead; and so the affinity ceased, at least the ground of suspicion of the witness's partiality: and as to the other, cousin-german by our custom doth not exclude a witness; nor doth our law esteem him a conjunct person, which was never extended to an uncle and nephew.

It was REPLIED, That affinity doth not cease by the death of the wife; neither doth the respect that might bias the witnesses; and, upon that same account, a cousin-german is not an unsuspected witness; and, in heritable rights, witnesses should be above exception.

The Lords rejected both the witnesses; unless it could be made appear there was *penuria testium;* in which case they allowed them to be received *cum nota.*

Vol. II, Page 672.

1679. *January* 17. GEORGE CHEYN *against* The LORD ROSE-HILL.

GEORGE Cheyn having charged the Lord Rose-hill for payment of 5000 merks contained in a bond granted by the Earl of Northesk, his father, and him, —he suspends on this reason, That the bond was never a delivered evident by the Earl of Northesk, the principal debtor, but it was subscribed by him and the suspender for borrowing of the sum; but was detained in Northesk's own hands, or his lady's, or others in his family, blank in the creditor's name, till the Earl fell in his late indisposition of losing his speech, and so becoming unable to manage his affairs; after which no person was in capacity to deliver the same. And as to George Cheyn, there was never money borrowed from him by the Earl, or his son; and if he accepted of a blank-bond after the Earl's indisposition, which was known to all, he was *in pessima fide;* and therefore, though writ ordinarily can be taken away by writ, or oath of party, yet it hath been often sustained,—when bonds were pursued for, against one representing a defunct, or made use of to exhaust his moveables,—that the allegeance that the bond was undelivered, or retired, lying in his charter-chest at his death, was probable by witnesses: and the case here is as favourable; for, after the Earl's indisposition, no bond subscribed by him could be delivered, more than if he had been dead.

The charger ANSWERED, That such pretences might be alleged against every bond; and that Rose-hill, being in health, might have delivered the bond.

It was REPLIED, That there are here special circumstances, by the Earl's indisposition, which put this bond in the case as if it had been granted by a defunct: nor could Rose-hill have delivered the bond, he not being the principal debtor. And it is known there are many such bonds subscribed by Northesk, which, if they were sustained, would ruin his estate. It is also known by some of the Lords who treated betwixt the Lord Rose-hill, his mother and brothers, that this bond was not in Cheyn's hands, but in the heirs, and was to be given up to Rose-hill. Although it was pretended that my lady had received the bond, and delivered the money out of her own closet, yet there was no pretence that the money was Cheyn's, but the law presumes it to be my Lord's money; and

though the bond bears date five years ago, yet Cheyn had neither demanded annualrent, nor done diligence thereupon.

In consideration of these circumstances, the Lords, *ex officio*, ordained witnesses to be examined upon the reasons foresaid; and, if need be, that George Cheyn be examined *ex officio*, how he got this bond, when, and for what causes.

Vol. II, Page 675.

1679. *February* 13. MAXWELL *against* LINDSAY.

MAXWELL of Cowhill raiseth reduction of a decreet-arbitral, pronounced betwixt him and ———; as being *ultra vires compromissi*, and pronounced after the expiring of the submission.

The defender ALLEGED Absolvitor, Because the pursuer had ratified the decreet arbitral, and acknowledged himself debtor for 2000 merks decerned thereby; and, in corroboration thereof, had disponed land for the same.

The pursuer REPLIED, That he was under caption when he granted the said right; and there was no abatement granted to him, but he gave security for the whole sum decerned; neither did he ratify the decreet-arbitral, nor pass from all question against the same, but only, in corroboration thereof, granted security: and though he had made actual payment upon distress, it would import no homologation, nor would exclude him from reduction of the decreet and recovery of the money.

The Lords repelled the defence founded upon the security granted, in respect of the reply,—that the defender was under caption: which, though it would not reduce the deed as done by force, yet it did not import homologation, as in the case of voluntary payment without distress.

Vol. II, Page 693.

1679. *February* 18. LAIRD of WEDDERBURN *against* SIR ROBERT SINCLAIR.

JOHN Stuart, son to the Earl of Bothwell, having obtained a *commendam* of the abbacy of Coldingham; the Earl his father being forefault, and his posterity dishabilitated to bruik estate or dignity in Scotland, John's *commendam* fell by the dishabilitation; and the abbacy was erected in a temporal lordship, in favour of the Earl of Hume, who gave a tack to Wedderburn's predecessor for 3000 merks of grassum, of the teinds of Kello and Kimmergem, which were parts of the abbacy. But thereafter the King grants a re-habilitation to John Stuart, bearing to be upon commiseration that John was an infant the time of his father's crimes, and noways accessory thereto; which was in March 1621. Thereafter there are several contracts betwixt Henry Stuart, brother to John, for John's behoof, and John himself; whereby the Earl of Hume dispones all right he has to the abbacy in favour of John; and consents, that, in the subsequent Parliament, John's re-habilitation by the King should be ratified, and that he should procure an erection to himself of the abbacy: whereupon, in August 1621, there is an Act of Parliament ratifying the King's re-habilitation to John,

and rescinding all right to the contrary. Whereupon John demitted his *commendam* in the King's hand, and obtained the abbacy erected to him and his heirs heritably; which right comes in the person of Douglas of Ivelay. Dame Elizabeth Douglas his heir, and Sir Robert Sinclair her husband obtained a decreet against the Laird of Wedderburn, for the full value of the teinds of Kello and Kimmergem for many years; in respect his predecessor's tack fell in consequence by John Stuart's re-habilitation, and the rescission of the Earl of Hume's author's right by Act of Parliament: upon which decreet Sir Robert apprises Wedderburn's estate, and, amongst the rest, the teinds of his own lands. Wedderburn hath raised reduction of this decreet on this reason,—that it is null, in so far as there being a defence admitted to Wedderburn's probation, that, by the contracts betwixt the Earl of Hume, John and Henry Stuarts and Ivelay, their rights were burthened with all deeds done by the Earl of Hume, which might import warrandice against the Earl; for which incident was sustained; and thereupon Sir Robert Sinclair, and several others, had deponed concerning their having of the writs, for proving of Wedderburn's defence; likeas one of the contracts betwixt the Earl of Hume and the Stuarts was produced. And yet Sir Robert took out a decreet, circumducing the term unwarrantably, because neither the writ adduced *ad modum probationis* was advised, nor found not to prove; neither was the incident closed by advising the oaths taken therein; till which were done the principal cause slept, and there could be no progress therein by circumduction of the term. And now the whole writs are produced for proving that John Stuart's right, from the Earl of Hume, was with the burden of all rights granted by the Earl, importing warrandice; and particularly Wedderburn's tack, which though it bare only warrandice from the Earl's fact and deed, yet that warrandice was incurred; in so far as it is evident, by the writs produced, that the Earl of Hume colluded with John Stuart, to suppress his own right of erection, and to suffer John to get his re-habilitation ratified in Parliament, rescinding the Earl's right, and obtaining a new erection to John, upon the demission of his *commendam;* for which, by the contracts, John is obliged to pay the Earl 4000 pounds sterling, with an annualrent of 300 pounds sterling yearly; for which the Earl bruiks the abbacy to this day: so that the Earl, by his own deed, had suppressed his own right, with which Wedderburn's tack fell in consequence.

It was ANSWERED for Sir Robert, That he opponed his decreet *in foro;* and, for what is alleged upon not advising the incident, or contract then produced, it is not relevant, unless Wedderburn, at the circumduction of the term, had proponed the same; so that it is competent and omitted, and is not now receivable; especially seeing nothing could have been alleged, either upon the oaths in the incident, which were all *negativè*, or upon the contract then produced, which could not prove. Neither can all which is now produced prove the allegeance that Wedderburn's tack would have inferred warrandice against the Earl of Hume, upon his own deed; for he did no deed, but only omitted to oppose John Stuart's re-habilitation, and produce his right in Parliament, he being then minor; so that an Act of Parliament having passed, the Lords, by their interlocutor upon the like process, *in anno* 1627, found that they could not cognosce upon the Act of Parliament for re-habilitation of John: which interlocutor cannot be quarrelled, but must have the same effect now. And there is no

doubt but the Parliament can, *ex plenitudine potentiæ*, rescind the Earl of Hume's right; but the Lords cannot, upon the Act *salvo*, cognosce upon the same.

The pursuer REPLIED, That though his procurator, being absent and sick, did not object the circumduction of the term, yet a writ produced *ad modum probationis*, and *ab initio* marked when produced, by the clerk's hand; he could not warrantably give out the decreet upon circumduction, though no objection had been made, unless he had had warrant from the Lords, upon representing that a writ was produced, and oaths upon the incident, and neither advised. And though these could not then have proven the point, they would have stopped the circumduction, and put the cause to the roll of concluded causes: so that any writ, before it came in course to be advised, would have been received. And the very contract then produced, with the act of re-habilitation, were sufficient to prove the point, *viz.* The collusion of the Earl of Hume, not only by mere abstaining to produce his right, which the law interprets a fact; as when a party suffers certification in an improbation against his own right, whereby the rights derived from him fall in consequence, the parties not being called; but much more here, where it is not only so, but an evident contrivance for great sums of money: for, if the Earl's right had been produced in Parliament, their justice would have obliged them to have excepted the Earl's right; for though it be a severe law, yet it is an unquestionable law, that the posterity of forefault persons may be dishabilitated, and a valid right granted thereupon by the king; which could not, by any voluntary act of re-habilitation by the king, be annulled; so that the Parliament would only have re-habilitated John Stuart, with the exception of the Earl of Hume's right, much more with exception of Wedderburn's tack from the Earl, for causes onerous. And albeit the Lords, *in anno* 1627, had, by their interlocutor, found, That the Act *salvo* could not warrant them to cognosce upon a special Act of Parliament of re-habilitation, yet the case is now altered by the Act of Parliament 1633, ordaining the Lords to judge of the rights of all parties, past and to come; without respect to private Acts of Parliament, proceeding without citation, or hearing of parties; and declaring that to be the meaning of the Act *salvo*, in that and all preceding Parliaments.

The Lords found, That a writ having been produced *ad modum probationis*, and oaths taken upon the incident, though *negativè*, that the decreet upon circumduction of the term was unwarrantably given out by the clerk, without representing these things to the Lords, though no objection was made by the party: and found the writs now produced did prove that John Stuart's right was burdened with all deeds done by the Earl of Hume, importing warrandice; amongst which Wedderburn's tack was enumerated; and that the disposition of the Earl of Hume's right to John Stuart, for great sums, and not producing the same before the Parliament, was a fact inferring warrandice against the Earl of Hume: and therefore reduced Sir Robert Sinclair's decreet, and the apprising following thereupon; except as to Sir Robert's own teinds, which he had uplifted and consumed by virtue of the said apprising, not only from the citation, but to the sentence also.

Vol. II, Page 694.

1679. *February* 19. SWINTOUN *against* The LAIRD of TOFTS.

UMQUHILE Mersingtoun gave an infeftment of relief to Tofts and others: and now there is a declarator of extinction raised of that infeftment, at the instance of Mersingtoun, and Mr Alexander Swintoun, his successor, upon satisfaction of the sums for which it was granted by the creditors, or by Tofts himself; and particularly by a bond of 2000 merks addebted by Tofts to Mersingtoun *in anno* 1639, bearing Tofts to have borrowed that sum from Mersingtoun; and obliging Tofts to retire a bond, due by Mersingtoun to some of his creditors, for the like sum, or otherwise to repay the same.

It was ANSWERED for Tofts, That Mersingtoun was addebted to him in other 2000 merks, with which he craved to compense; and, for instructing thereof, condescended upon a provision in the infeftment of relief, bearing, "But prejudice to Tofts of another bond of 2000 merks, due by Mersingtoun to him."

It was REPLIED, That this reservation could not instruct the debt, unless the bond reserved were produced; it being the common custom of this kingdom to extinguish bonds by payment, retiring and cancelling thereof without a discharge, unless it had been registrate, or infeftment following thereon: and, therefore, no subsequent writ, narrating or reserving a prior bond, can instruct the debt to be resting, without production of the bond; which, otherwise, law presumes to be satisfied and retired. For it is impossible for parties to remember or provide against narrations, or reservations of such writs, either in missive letters, or posterior securities, but do confidently retire the principal bond, upon payment of the sum.

It was DUPLIED, That though narratives *non probant contra tertium, nam non creditur referenti*, &c. yet they prove against the narrator; but much more a reservation.

It was TRIPLIED, That, though these prove, against the narrator, that the debt was due the time of the narration or reservation, yet it will not prove that the debt continues and remains due. And that parties behoved to take discharges to meet such reservations or narrations: or otherwise none could be secure, by securing principal writs, who could not possibly remember or know what posterior letters they had written relating to such bonds, or narrations, or reservations they had made thereof in posterior writs.

The Lords found the reservation did not instruct the debt to be now resting, unless the bond reserved were produced; in respect of the known custom, to satisfy and retire principal bonds without discharge: for, in that case, *chirographum non repertum apud creditorem præsumitur solutum.*

Vol. II, Page 697.

1679. *February* 19. The LAIRD of PITCURR *against* The LAIRD of DUN.

THE Laird of Fullertoun being taken with caption at the instance of Pitcurr, the Laird of Dun interposed, and gave bond with him to present his person prisoner, in the tolbooth of Dundee, upon the 1st day of February last, or else to pay the debt: Fullertoun appeared in the tolbooth the said day, between ten

and twelve, which was the day appointed; and instruments were taken thereon in his name and Dun's: there was also an instrument taken by Pitcurr's procurator, that he had attended with Dun's bond and caption, in the upmost storey of the tolbooth, where prisoners used to be incarcerated, from nine to one of the clock the said day; and thereupon protested, that Dun might be liable for the debt.

And, having charged him upon this bond, Dun SUSPENDS on this reason,—That he had performed, by Fullertoun's appearing, the time appointed, within the tolbooth.

The charger ANSWERED, That the suspender had not fulfilled: 1*mo*. Because he had not entered him prisoner, unless he had presented him to the jailer or magistrate, as a prisoner, and had required them to call publicly if there was any person having Pitcurr's caption that might have necessitated the magistrate or jailer to detain him prisoner: in which case, Pitcurr's procurator, who was attending above, in the tolbooth, in the room where prisoners used to be incarcerated, would have produced the caption: but all that Fullertoun did, was to come to the council-house, the doors whereof were and are ordinarily patent, and where prisoners stay not. *2do*. The bond bears,—"That Fullertoun should present himself to remain prisoner for fulfilling the will of the letters of caption, and should procure no suspension."

It was REPLIED, That this last clause was not a part of the obligation, but did only express the end for which Fullertoun was to be presented; otherwise that would import, that if, at any time, he should have escaped, Dun should have been liable; which could never have been understood, unless it had been so expressed.

The Lords found Dun's bond not to be fulfilled by the instruments produced; seeing he offered him not to the magistrate as his prisoner, and required him to call for the other party to produce the caption: but did not find Dun liable for his escaping, if he were once a prisoner. *Vol. II, Page* 697.

1679. *February* 21. WILLIAM WHITE *against* THOMAS CHATTO.

WILLIAM White pursues Thomas Chatto for payment of £500 borrowed by him from the pursuer's wife, during the marriage, wherein the father had granted a bond in favour of Isobel Chatto.

The defender ALLEGED, That he could not be liable in double payment; and was content to pay, either to the pursuer or to the said Isobel: who alleged, that her bond could not be taken from her, by being proven, by the defender's oath, to have been borrowed from his wife, but only to be proven by her own oath.

The pursuer ANSWERED, That his libel was relevant to be proven by the defender's oath, that he had received sums of money from his wife, during the marriage; and is not obliged to refer it to the oath of any other. But if the defender has granted bond to a third party, at his wife's desire, he did it *mala fide*: for he could not be ignorant that he should not have given a bond for money borrowed from a wife, but to herself or her husband; and if, by doing otherwise, he run the hazard of that third party's denying the sum to have been

made up of the money received from the pursuer's wife, *sibi imputet* if he become liable in double payment.

The Lords found the libel probable by the defender's oath; and allowed him, if he thought it fit, to have the oath of the third party, whether the bond granted by him to her, was for the same cause; but would not receive it by way of quality, that he had given bond to a third party, at the wife's desire.

Vol. II, Page 702.

1679. *February 25.* The KING'S ADVOCATE *against* The EARL of NITHISDALE.

THE King's advocate pursues a reduction of this Earl of Nithisdale's right of the lands of Duncow, on this reason,—That, by the Act of Annexation, *anno* 1593, the lands of Duncow are annexed to the crown; and, accordingly, the rents thereof have been still counted for in Exchequer.

The defender produced a charter from the king *in anno* 1540, bearing expressly the lands of Duncow to be a part of the earldom of Galloway; which was dissolved, by Act of Parliament, to be set in feu-farm; and, accordingly, was feued to the Earl's predecessor: likeas the Act of Parliament dissolving the same is evident from the Acts of Parliament. The defender doth also produce a progress of the said lands down to himself.

And the Lords having, before answer, ordained either party to produce such evidences as they could anent the possession, it is clear, by the evidences adduced, that the Earl and his predecessors have been in immemorial possession of the said lands, by lifting the maills and duties thereof, by out-putting and in-putting tenants; and that there was never an account made in Exchequer thereof, but only of the feu-duty contained in the Earl's charter. And, as to the Act of Parliament 1593, it is a repetition of all the king's property, by several preceding annexations; and though it expresses Duncow in the denomination, which is not expressed in the former annexations, yet, before it was feued, it was a part of the lordship of Galloway, as the Earl's charter from the king bears; which the particular enumeration thereof doth not alter; but Duncow is expressed particularly, because, since the Earl's feu, it is divided from the rest of the lordship of Galloway, and makes a particular *æque.*

It was ANSWERED, That the king hath not, nor can have, a charter for his annexed property, but hath right thereto *jure coronæ:* and, therefore, showing that the lands of Duncow are annexed *in anno* 1593, it is to the king a sufficient right; and nothing but a posterior dissolution and feu can exclude the same.

The defender REPLIED, That an original annexation, expressing the particular manner of the lands coming to the crown by forefaulture, recognition, or otherwise, though done by Act of Parliament, by citation of parties, might be pleaded not to come in under the Act *salvo*, or under the cognizance of the Lords; yet, if this were extended to annexations, repeated by the Act 1593, or other Acts, it would, at one blow, annul all the feus of the king's property in Scotland, they being all therein enumerated, as lordships and baronies annexed to the crown; and, therefore, though they be a part of the king's property, yet that is without exclusion of the feus lawfully made after dissolution in Parliament, as this is prior to the said Act of Parliament.

The Lords found, that the Earl's charter *in anno* 1540, did instruct the lands of Duncow to be a part of the lordship of Galloway; and that, by the prior Act of Parliament, it was dissolved in order to a feu; and that the same was not derogated from by the Act of Parliament 1593, but was a valid right, clad with immemorial possession by him, and the successors of the first vassal; and that the rents were never counted for in Exchequer, but only the Earl's feu-duty: and therefore assoilyied the Earl from the reduction.

Vol. II, Page 702.

1679. *February* 26. JOHN ELPHINGSTOUN *against* The EARL of LOTHIAN.

IN the process at the instance of John Elphingstoun and Balmerino, against the Earl of Lothian, disputed upon the 24th of January last, the Lords, having ordained Cockpen and others to be examined, *ex officio*, how the blank bond in question came in Sir Thomas Nicolson's hand, for what cause, and to what effect: —either party having given in interrogatories, Cockpen desired that he might be allowed to give in his oath in writ, in answer to the interrogatories of both parties, or to have liberty to look upon the paper he had drawn in answer to their interrogatories, in respect of his age, being eighty years.

The Lords refused both these desires, as being a preparative opening a way for prompting and instructing of witnesses how to depone, and hindering the expiscation of the truth.

Vol. II, Page 703.

1679. *November* 28. JOSEPH MARJORYBANKS *against* RANKIN.

BY a minute of contract, Joseph Marjorybanks sells to Rankin the lands of Fields, &c. and obliges himself to give him a sufficient right thereof; and, by a posterior clause, obliges him to deliver the same progress of right that he had from his author, for which Rankin was obliged to pay him such a price. Whereupon Marjorybanks charges for the price. Rankin suspends, and raises a declarator, that the minute should be declared void, for not-performance of Marjorybanks's part, *viz.* delivery of a sufficient right; seeing the progress offered is defective. 1*mo*. Because the apprising of the original right is null, and not subscribed by the messenger, as judge thereto. 2*do*. Marjorybanks's right is by an assignation to the apprising, which assignation is not produced.

It was ANSWERED for Marjorybanks, That he produced the attested double of the assignation, with an infeftment of the land, expressing the assignation; and that he was willing to get the consent of the apparent heir of the cedent, ratifying the right; and was willing to give special warrandice in his other lands. 2*do*. He offered the same progress that he received from his author, conform to the last clause in the minute, which must qualify and restrict the former clause. And as to the apprising, the vestige of the messenger's name remains, and has been but worn out by time; and there is an allowance of the Lords on the back thereof; and a progress, near forty years, thereupon, with possession.

The Lords found Marjorybanks obliged to make a sufficient right, and that the posterior clause was not restrictive, but cumulative; and found the offers made, did not oblige the buyer to accept thereof: but, seeing there was no clause irritant, they did not declare the minute presently void, but gave the first day of February to produce the assignation, or prove the tenor thereof; but gave no answer to the other point, till the apprising was produced.

Vol. II, Page 710.

1679. *December* 2. CHIRNSIDE *against* His TENANTS.

CHIRNSIDE pursues his tenants to remove; who alleged Absolvitor; because the warning is anterior to the pursuer's infeftment, being a singular successor, and the execution does not bear a warning at the kirk door in time of divine service; and whereas the pursuer produces now a new execution, it cannot be received, as being most suspected of forgery.

Yet the Lords suffered the pursuers to mend the warning, they biding by the same to be true; and sustained the same, unless the defenders would improve it.

Vol. II, Page 713.

1679. *December* 3. MARGARET WISEHEART *against* HUME of LINTHILL.

THERE being a decreet *in foro* obtained at the instance of Mr Andrew Monro against Linthill, for payment of a bond granted by Linthill's father to Major-General Monro, *in anno* 1641; whereby Linthill, being then a public collector, having gotten a discharge from the Major-General for the payment of the quarterings of his regiment, he, by his bond, acknowledged that there was £1455 due to the Major-General; and obliged him, that, so soon as he should obtain payment from the public of these quarterings, he should pay the said sum to the Major-General. Whereupon Mr Andrew Monro, as having right from his father, intented a pursuit against this Linthill, as representing his father, *in anno* 1662. And at last there was a decreet obtained *in foro* at the instance of Margaret Wiseheart, who had right thereto, by progress, for a part of the sum, with the annualrents of it, Linthill having been necessitated to produce his father's count-books with the public, with a fitted account betwixt the public and his father; whereby he charges them with the whole sum due for the Major-General's pay and quarterings, and discharges the public with intromission of the public money; and, with his own hand, sets down the balance, that there was resting to him, by the public, 9000 pounds: he did also produce a discharge by the Major-General for a term's annualrent of the said sum of £1455, bearing this clause,—That he should not be thereafter obliged for the annualrent, unless he got payment from the public. Whereupon Monro insisted for the said sum and annualrent.

It being ANSWERED for Linthill, That the bond founded on wanted witnesses, and that there being a rest due to him of £9000, and he having allowed

to the public a precept drawn by them for £10,000; he could not be liable to the Major-General further than to assign a part of the rest due to him, because it was reasonable he should have preferred his own payment to the Major-General's. Neither could he be liable for annualrent, albeit the common rule be, that once payment of annualrent infers it always thereafter; because the ticket, instructing that he did pay a term's annual, bears,—That it shall not pay annualrent thereafter, unless it be paid to him by the public.

To which it being REPLIED, That Linthill's bond was acknowledged by the discharge of the annualrent accepted by Linthill, and now produced by his son; so that Linthill could not prefer his own payment to the Major-General's, because his ticket bears,—That he should satisfy the same out of the first and readiest of the public money he should receive thereafter. And, by his own count-books, it is evident that he charges the public with Monro's discharge of the dues of his regiment, whereof this is a part. And, by the dates of his said receipts in the said account, it is clear that he received most considerable sums of money from the public after his bond to Monro; and, as to the restriction in his receipt of the annualrent, it alters not the common rule, annualrent being only demanded since Linthill received public money after the ticket.

Whereupon the Lords found, That Monro's bond, being a part of the debt in Linthill's account, the whole articles whereof were near £100,000; and by his intromission on the credit-side all was satisfied, except £9000 in balance: that, therefore, Monro should suffer a proportional abatement of his £1400, effeiring to the balance, which was wanting to Linthill of his whole account, whereby Monro's sum was restricted to £1200; and annualrent was sustained therefor. And, as to the precept of £10,000, which Linthill allowed to the public, the Lords would not put Monro to prove that it was paid; but, seeing Linthill accepted it, and did no diligence, nor produced no protest for not acceptance or not payment against the collector, they held the same as paid.

This decreet and process being assigned to Commissary Aikenhead, and by him to his wife Margaret Wiseheart, she obtained a second decreet of suspension, finding the letters orderly proceeded, the reasons being the same that were in the first decreet. And Linthill, having raised reduction, and given in a bill of suspension upon the same grounds, the Lords ordained both to be discussed upon the bill. Which being heard *in præsentia*, the Lords adhered to the decreets *in foro*, and repelled the whole reasons of reduction, there being nothing new, but that this was a public debt; which was not found, seeing, by the count, Linthill was paid: and the Lords would not descend to consider the points proponed and repelled in the former decreets, but sustained the allegeance against them all, that they were proponed and repelled.

In this process it was also ALLEGED for Linthill, That, *in anno* 1665, there was an interlocutor by which Monro was admitted to prove Linthill's other intromissions. This bill was abstracted by Monro, and therefore the decreet was unwarrantably extracted, without inserting that interlocutor; which was referred to the knowledge of some of the Lords. Whereunto the Lords had no respect; seeing that decreet cannot be quarrelled by no other mean but by the minutes of process, except *de recenti*.

Vol. II, Page 714.

1679. *December* 3. PATRICK and HENRY HUMES *against* RENTOUN of LAMBERTOUN.

THE Lord Rentoun, Justice-Clerk, having obtained decreet against umquhile Lambertoun, as having intromitted with his woods and rents *in anno* 1638, and not having counted therefor to the public; and thereupon having apprised Lambertoun's estate, and having disponed the right to Mr Patrick and Henry Humes: Lambertoun gives in a bill of suspension of the decreet, with a reduction thereof, and of the apprising following thereon, upon this reason, That it was unwarrantably extracted, omitting the material interlocutor, *viz.* That if, betwixt and such a time, 18,000 merks were paid, it should be accepted for the whole sum contained in the decreet: which was referred to the knowledge of some of the Lords. And he, not adverting thereunto at the extracting, and not satisfying the said sum within that certain time, Lambertoun being then a pupil; he ought now to be restored.

The Lords repelled this reason; and found that the decreet could not be altered upon the memory of any of the Lords, except *de recenti.*

Vol. II, Page 716.

1679. *December* 4. GEORGE M'CALLA *against* MARION DICKSON.

GEORGE M'Calla, by his contract of marriage with Margaret Cockburn, having an obligement of Mr William Cockburn, for payment of 1000 merks, as a part of his tocher;—after the decease of Mr William, Marion Dickson, his spouse, surviving, he pursues the said Marion, as executrix confirmed to the said Mr William, to make payment to him of the same, upon his security to pay her the annualrent thereof during her life; or otherwise, to find him caution for the sum after her death: in respect that she had paid the remanent children's portions, and so would have no visible estate after her death.

The defender ALLEGED, No process for this sum before the term; and, if such processes were sustained, it would give a great trouble to the lieges, upon the like pretences, to secure the sums before the term of payment: which was never done, nor justly can be done, *quia plus petit qui ante terminum petit.*

It was ANSWERED, That, whatsoever might be done, in case of debtors for their proper debt, it is most just that executors, who have but an office to administrate a defunct's estate, which is not their own property, but in custody and trust,—should secure the defunct's creditors even before the term.

It was REPLIED, That the executrix had found Mr John Cockburn cautioner in the testament, who is abundantly sufficient to secure all the defunct's creditors; and she could be urged no farther.

The Lords found, That if there could be no just objection against the cautioner, the executrix was no farther obliged before the term; but, if there were, they ordained the executrix to secure 1000 merks to herself in liferent, and to George M'Calla in fee.

Vol. II, Page 716.

1679. *December* 9. GRANT of AUCHTERBLAIR *against* MR JAMES GRANT.

IN the action between Mr James Grant and Grant of Auchterblair, wherein there was an interlocutor marked the 27th day of November last; it having been found by the Lords, That these parties having consigned a blank bond and a discharge in the hands of arbiters, who filled up the blank bond, and delivered the same to one party, and his discharge to the other; did exclude all reclaiming against the bond, by accepting and acquiescing in the discharge; as being equivalent to the ratification of a decreet-arbitral after it was pronounced:

It was now further ALLEGED by Auchterblair, who suspended the bond filled up, That, if the arbiters had shown him what was in the bond then filled up, when he received the discharge, or before, it might have imported his approbation thereof. But it is offered to be proven, by the arbiters' oaths, that they did not show what was in the bond, but delivered the bond, sealed in a paper, to Mr James Grant, and gave the discharge, sealed also in a piece paper, to the suspender, and obliged them, upon oath, not to open the seals till the next day; so that his receiving the discharge in this manner could not import his acquiescence and approbation, filled up in the bond, which he did not know.

It was ANSWERED, That this allegeance is contrary to the declaration produced by the arbiters and oversman; and, though it were true, it alters not the case, seeing Auchterblair, so soon as he had known the sum, ought to have offered back the discharge, and taken instruments thereupon.

It was REPLIED, That, so soon as he knew the sum, he came to the arbiters and reclaimed.

The Lords ordained the arbiters to be examined upon oath, how the bond and discharge were delivered; and whether the bond was then shown to him; or, if they signified what was the sum filled up therein; and if, before the delivery thereof, it was not shown to him; and whether, therefore, he came to the arbiters to reclaim, and when, and how. *Vol. II, Page* 717.

1679. *December* 12. BETHIA M'KENZIE *against* SIR HUGH CAMPBELL of CALDER.

BETHIA M'Kenzie, having raised a caption against Chisholm of Comber, did therewith charge Sir Hugh Campbell of Calder, Sheriff of the shire, to apprehend the rebel, being in the Sheriff's own house; as the executions of the caption bear: and yet the Sheriff did not put the letters to execution, but suffered the rebel to escape; and therefore is liable for the debt.

The defender ALLEGED, 1*mo*. That the messenger's execution could only instruct that he had given a charge to the Sheriff; but that the rebel was with the Sheriff in his own house, cannot be proven by the execution, which is but extrinsic, and at least must be verified by the oaths of the witnesses in the executions. 2*do*. It is offered to be proven, that the rebel had fifteen or sixteen men in arms in and about the Sheriff's house, so that he was not in a capacity to make him prisoner; but, if need be, it is offered to be proven, by the messenger's oath, that he took back his charge upon that consideration, and promised to give no execution.

The pursuer ANSWERED, That it is a proper part of the messenger's office to give executions, not only bearing the charge, but also the circumstances of the place, and condition of the Sheriff and the rebel; which, therefore, is probative and valid unless it be improven; and the messenger being *functus officio*, his oath is not competent in prejudice thereof. Nor could any such promise be effectual against the party at whose instance the caption was truly executed; and the messenger might have been compelled to give the executions, notwithstanding of any promise to the contrary. Neither is the defence relevant, that the Sheriff had not sufficiency of force; but he ought to have attacked the rebel; and nothing could exoner him but an actual force, *vi majori*.

The Lords repelled the defences, and decerned against the Sheriff.

Vol. II, Page 723.

1680. *January 27.* AGNES SANDILANDS *against* RACHEL SANDILANDS.

BAILIE Sandilands, in the contract of marriage of his daughter, Agnes Sandilands, provides her with a tocher; and the contract contains this clause, That she shall also be a bairn of the house, and have her share with the other bairns of the family. And, in the contract of Rachel Sandilands, he contracts with her a tocher, which she accepts, in full satisfaction of her portion natural and bairn's part of gear, and all that she can succeed to by the decease of her father, any manner of way. The bailie having died intestate, Agnes and Rachel contend, before the commissaries, for preference,—who should be executor dative; and the commissaries did prefer Agnes, and did exclude Rachel, in respect of the foresaid clauses in her contract of marriage. Rachel raiseth reduction, on this reason:—That the commissaries committed iniquity in excluding her; because where there are more co-heirs or bairns, if all of them should accept tochers in full satisfaction of all they could succeed to by their father's death, that would exclude any of them to succeed, either in heritage or moveables; because, it being a clause in their father's favours, renouncing their interest to him, it returns back to them by his death. For none would pretend that his succession would thereby become *nullius*, or as *bona vacantia* to belong to the king; nor could it belong to any other relation or agnate of the father, seeing the further degree can never succeed while there is a nearer. And, therefore, Rachel's acceptance, "in satisfaction of her," &c. though it had borne an express renunciation of her father's succession, it could operate no more, but that her father might have freely disposed by nomination, assignation, or legacy, of his dead's part. But, not having so done, Rachel's part must return to her; especially seeing Agnes returns to be a bairn of the house with the other bairns, which must bring in Rachel, there being no other bairn but these two: and, though there were others, yet Agnes, being a bairn, could only give her right to the bairn's part, but not to [the] dead's part; from which either party is excluded by the tocher received.

It was ANSWERED for Agnes, That the reasons of reduction are nowise relevant; for, though it be true, that, where all the children renounce their interest in the father's succession, he not having disposed thereof, it returns to them all,—yet that holds not where some renounce, and others not; for then the re-

renouncer's share accresces to those who renounce not, as in this case. And albeit, at the defunct's decease, there were no bairns, beside the heir, but these two; yet, the time of Agnes her contract, there were other bairns who died before the father. And the clause in Agnes's favours, "to be a bairn in the house," by the conception thereof, extends not only to the bairn's part, but to the dead's part; and, therefore, Rachel's renunciation excludes her, and makes the whole executry to befal to Agnes.

The Lords sustained the confirmation of Agnes; and found, that by the acceptance of the tocher in Rachel's contract, "in full satisfaction," &c.—not being in Agnes's contract, but Agnes being provided to be a bairn in the house, and no relict having survived,—that the whole executry of the defunct accresced to Agnes.

Vol. II, Page 748.

1680. *January* 28. PHILIP VAN PORTAN and SANDILANDS *against* CAPTAIN ANDREW DICK.

PHILIP Van Portan pursues Captain Andrew Dick, for certain merchant ware, which was robbed at sea from him by Captain Martine, and intromitted with by Captain Dick.

The defender alleged Absolvitor; because he bought the goods *bona fide* from Martine, and did not know that they were taken in piracy.

It was REPLIED for the pursuer, 1*mo*. That stealth or robbery are *vitia realia*, and so give interest, to the party injured, to recover his goods, *rei vindicatione*, from any intromitter or haver.

It was DUPLIED for the defender, that *rei vindicatio* hath only effect against the present haver, *aut qui dolo desiit possidere*.

It was TRIPLIED for the pursuer, That *vindicatio* takes not only effect against the present haver, but against any who had the same, *in quantum sunt lucrati*; and, therefore, Captain Dick is liable for what more he got than he gave. 2*do*. He is liable for the whole value, because he was accessory to the piracy, by resetting goods from a privateer, with whom he could make no bargain *bona fide*; because, by the law of nations, and the custom of all Admiralties, buying goods from a privateer is prohibited, till they be declared prize; and Captain Dick, by his oath, acknowledged that Martine told him these were prize-goods.

The Lords found it relevant, That these goods were robbed at sea, and were not declared prize, to make the defender liable for restitution of what he had in his possession the time of the citation, and for what he made profit of, which he had disposed of before the citation. And ordained either party to adduce evidences of the neighbouring Admiralties, for clearing the custom,—whether it be unwarrantable to buy any goods from privateers, not only that are in ships taken prize by them, but that are in their caping frigate, until the adjudication pass; to the effect, that, if that custom shall be proven, Captain Dick may be liable for the whole value: for there was produced the late treaty of Breda, in which there was an article to that purpose, but did not sufficiently instruct it to be the common custom of nations. And it was not found sufficient to prove that these goods were taken in piracy by Martine,—that both he and Captain Dick

being cited before the admiral, Martine was decerned for not finding caution *judicio sisti*, and was fugitive; and, being apprehended at London by Van Portan, he did acknowledge the piracy, and enumerated the goods, amongst which these in question were contained; he being voluntarily dismissed by Van Portan, upon that confession.

Vol. II, Page 750.

1680. *February* 6. NAPIERS, Supplicants.

NAPIER of Wrights-houses having died without issue, two women of his name, of a far relation, gave in supplications, bearing,—That either party might take out brieves out of the Chancellary for serving themselves heirs to the defunct, which might be directed to any judge ordinary in Scotland, which cannot otherwise be known to the supplicant; whereby an ignorant inquest may serve; which will put them to the difficulty and necessity of reduction; and therefore desiring that the Lords would prohibit brieves to be issued or served, till they were cited to the service.

The Lords gave an injunction to the director to the Chancellary, ordering that he should give out brieves to neither party, till that party demanding the brief return an instrument of the intimation to the Chancellary; bearing intimation of the brief demanded, and of the judge to whom directed, and of the day in which she is to be served: that thereby the other parties might attend, and might be heard for their interests.

Vol. II, Page 754.

1680. *February* 18. The EARL of MAR *against* His VASSALS.

THE Earl of Marr having pursued reduction of a feu, upon a clause therein, —"That upon two terms running in the third it should be null;" and for instructing thereof, produced the vassal's retour:

The Lords suffered the vassal to purge by payment at the bar; seeing the retour bears a feu-duty, *si petatur*, in the first part of the retour bearing the defunct's right; though these words were not repeated in the posterior clause of the retour or precept, declaring the feu-duty, and expressing the clause irritant.

Vol. II, Page 759.

1680. *February* 25. SIR JOHN SCOT *against* The ARCHBISHOP of GLASGOW.

SIR John Scot, having right from the Earl of Lothian, who had the gift of patronage of the church of Ancrum from the King, *in anno* 1625; did thereupon present; and having obtained horning of course, did charge the Archbishop to try and admit. He gave in a bill of suspension; whereupon the cause was ordained to be discussed; and insisted upon this reason,—that he was not obliged

to accept Ancrum's presentation, because he had a better right to the patronage; in so far as King James, by his charter, *in anno* 1608, to the then Archbishop of Glasgow, upon the bishop's resignation, disponed the bishopric with all benefices thereto belonging, with a *novo-damus*, enumerating the patronage of Ancrum as one of the benefices belonging thereto, *cum omni alio jure* the King had to the bishopric or benefice foresaid; whereby the Archbishop had right before Ancrum or his author.

It was ANSWERED for Ancrum, That he had obtained a decreet *in foro* against Archbishop Lightoun, declaring his right to this patronage; in which decreet the King's gift, now produced, was founded on; and yet the decreet bears,—"That the Lords having considered the rights produced, declared Ancrum's right."

The Archbishop REPLIED, That bishops cannot dilapidate their benefices directly nor indirectly, by omitting lawful defences; and therefore *competent and omitted* is not relevant against their successors, they being but liferenters. *2do.* It cannot be questioned but collusion, in suffering decreets to pass, is a dilapidation; but this decreet is evidently collusive, bearing, That the Archbishop produced the King's gift, 1608, containing the patronage of Ancrum; and yet no mention of any defence founded thereon, which was obvious, the Bishop's right being anterior to Ancrum's: And though the decreet bears,—That the Lords did consider the rights; yet that could be only in relation to the allegeances of parties; but all the allegeance in this decreet is this dilator only,—No process till the dean and chapter be called.

It was REPLIED, That if decreets *in foro*, against beneficed persons, cannot operate against their successors, they shall have greater privileges than the King; and no process for or against them, can be finally ended. And as to the collusion, it does not appear from the decreet; seeing the bishop's right was produced, and under the Lords' consideration. And the great mean of termination of pleas is, that, after compearance, nothing then competent and omitted can quarrel the decreet, even though there be no defence proponed, but the libel denied; much more where a dilator is proponed; seeing now it is declared by act of sederunt,—That parties cannot pass from their compearance, after dilators proponed and discussed, though sometimes they might.

The Lords found, That collusion did appear from this decreet; the bishop's right having been produced, and anterior, and an obvious defence thereupon, without any mention of the said defence: but delayed the interlocutor till the 29th of February.

Vol. II, Page 764.

1680. *June* 11. GORDON of DAVIDSTOUN and ISOBEL ROBERTSON *against* WILLIAM MENZIES.

GORDON of Davidstoun and Isobel Robertson pursue the Laird of Weym, and William Menzies his tenant, for a spuilyie of five horses and the said Isobel's whole household-plenishing. The defenders being absent, the libel was admitted to the pursuer's probation: who proved, that, in the night-time, some

unknown person committed this spuilyie; and that Gordon of Davidstoun, having followed the goods, found one of the horses in the possession of William Menzies, and marked the horse in the lug. Whereupon the question arose,—how far this probation could reach, the defender being absent; and, especially, whether the spuilyie being committed in the night-time, where there was no witnesses and the spuilyiers were not known, that a part of the spuilyied goods being found in the possession of William Menzies, did not infer a presumptive probation that he was actor or resetter of the spuilyied goods, and so liable to the whole spuilyie.

The Lords found, That it did not so infer a presumptive probation; but that the said presumption might be taken off, if Menzies could instruct that he came warrantably to this horse: but, because Menzies was absent, and probably upon design, because it could not be proven who the spuilyiers were, the Lords ordained a second citation to be used against Menzies, with this special certification,—that if he did not appear, and instruct that he came warrantably to the possession of this horse, that he should be decerned in the whole spuilyie, as actor, resetter, or accessary thereto.

Vol. II, Page 769.

1680. *June* 30. The PROCURATOR-FISCAL of PEARTH *dgainst* DUNBARNIE and JOHNSTON.

THE Procurator-fiscal of Pearth having pursued Dunbarnie and Johnston for blood-wits, they raised advocation upon this reason,—that the sheriff had unjustly repelled their defence, *viz.* That the bloods in question had been judged in Dunbarnie's bailie-court, before they were attached by the sheriff; Dunbarnie holding of the King *cum bloodwitis.*

It was ANSWERED, That this was but collusion to prevent the sheriff and the King of his casuality of blood, by bringing the cause before Dunbarnie's own bailie, constituted by himself, where he was both judge and party; and Johnston committed the blood out of Dunbarnie's bounds.

It was REPLIED, That Dunbarnie, being pursued by the party injured, had no just defence to exclude process, because that was his own court; though, if he had been pursuer in some cases, the cause might have been advocated from him upon the influence of his bailie: for, though he has power to constitute a bailie, yet the bailie is the sole judge, and may determine either for or against his constituent. And as for Johnston, though he committed the blood without Dunbarnie's jurisdiction, and thereby became convenable *ratione loci delicti;* yet he remained also convenable *ratione domicilii,* at the option of the party injured; who having convened him before Dunbarnie's court, he was not convenable again before the sheriff.

The Lords found the sheriff committed iniquity in repelling either of these defences; and therefore did advocate the cause.

Vol. II, Page 780.

1680. *July* 7. SLOWAN *against* The LORD of BARGENIE.

SLOWAN having charged the Lord Bargenie upon his bond of borrowed money, he suspends upon this reason,—That the true cause of granting the bond was for services to be done to the Lady Clanbrisle, Bargenie his lady; which were never done, but the contrary. Whereupon Slowan having deponed, by commission, that the bond was granted for disbursements and furniture to my lady, truly performed,—at the advising of the oath, it was alleged that the oath making it evident that the bond was granted by my Lord, *stante matrimonio*, for my lady's debt, to which he was only liable *jure mariti*, the marriage being dissolved, he is free; especially seeing he made no profit thereby; in the same way as if he had been decerned, as husband, to pay.

It was ANSWERED, That husbands' bonds are not dissolved as decreets against them *jure mariti*; nor doth the oath prove that the furniture was before my Lord's marriage; for, being during the marriage, my Lord is simply liable, and not *pro interesse*.

The Lords found that the oath proved not; and that my Lord's bonds could not be dissolved by the dissolution of the marriage.

Vol. II, Page 782.

1680. *July* 13. The KING'S ADVOCATE *against* YEOMAN of DRYBURGH.

The King's Advocate pursues Yeoman of Dryburgh for the avail of his marriage: who alleged Absolvitor, because his father had no ward-land, but was infeft upon an apprising for his security; which did not denude the King's vassal of the fee, but was consistent therewith, as *pignus prætorium*; especially, the appriser having died within the legal. The Lords having ordained the estate and burdens to be instructed, the defender deponed upon his rental; but was not suffered to depone upon the burdens, which his oath could not prove; and the term was circumduced against him, for not instructing his burdens, and for not proving this defence,—That the apprising was extinct by intromission or payment in the defunct's time: so that the defunct died uninfeft; and so his heir could not be liable in a marriage.

The Lords, upon these considerations, modified only two years' rent, acknowledged by the defender's oath.

Vol. II, Page 784.

1680. *July* 13. ARCHBISHOP of GLASGOW *against* The REPRESENTATIVES of The COMMISSARY-DEPUTE of DUMFRIES.

THE late Archbishop of Glasgow pursues the successors of the Commissary-Depute of Dumfries for the quots of testaments that were confirmed when he was depute; and that, upon the bishop's injunctions to the commissaries, approven of by the King, and recorded in the books of sederunt, bearing this article,—

That where there was no quot-masters named by the bishops, the commissaries should be countable for the quots of all testaments confirmed by them; which would be illusory, if their deputes were not liable for the quots of testaments confirmed when they were deputes.

It was ANSWERED, That the injunctions mentioned no deputes; and, though it did, it could only extend to the testaments confirmed by the deputes when they actually sat.

The Lords found the depute also liable for all testaments confirmed when the depute sat; seeing he ought to have secured the quot, before he confirmed the testament; if he had not made count and payment thereof to the principal commissary.

Vol. II, Page 785.

1680. *July* 29. Mr WILLIAM AIKMAN *against* JAMES TARBAT.

Mr William Aikman pursues James Tarbat, as representing his father, for payment of the balance of an account betwixt the pursuer's father and the defender's, signed by both.

The defender ALLEGED Absolvitor; because to the count subscribed there is subjoined a new count, all written with the pursuer's father's hand, by which the pursuer's father is stated debtor, as by note, in £1000, to the defender's father: and therefore craves to be assoilyied from the count, and to pay him the balance of the last count; which though not subscribed, yet being the hand-writ of the pursuer's father, produced by himself, it is probative in the same way as notes of receipt written by creditors' hands upon their principal bond; which are always allowed in part payment of the bonds, though not subscribed, though bonds be more solemn writs than counts: and cannot be presumed written *spe numerandæ pecuniæ*, or upon some design which did not follow; being immediately subjoined upon the same page with the principal subscribed account.

The pursuer ANSWERED, That such unsubscribed notes upon accounts cannot prove. And, though it could, the balance of the unsubscribed account bearing, (as per note,) hath no effect, unless the ticket were produced: for, wherever there is a subscribed count delivered, which used to be retired upon satisfaction, it is ever presumed retired and satisfied, unless it be produced; and therefore accounts or missive letters relative to bonds or tickets, have no effect without the bonds or tickets; for no man can remember what letter he writes.

The Lords found the unsubscribed account subjoined to the account on the same page, and written by the accountant's hand, probative to take away the subscribed account; but not to burden the accountant with the balance of the unsubscribed account, seeing the balance bears, *as per note* given to the creditor of the balance, unless that note be produced, which is otherways presumed satisfied and paid.

Vol. II, Page 793.

1680. *December* 8. ——— *against* The Lord Cardross.

In a pursuit at the instance of ——— against the Lord Cardross,—it was alleged, No process; because the second summons was at the pier of Leith; whereas Cardross was then within the kingdom, and so should have been cited personally, or at his dwelling-house.

It was answered, That the first citation being at the pier of Leith, Cardross being then out of the kingdom, the pursuer was warranted to proceed so with the second summons; especially seeing Cardross was accustomed to be about the border, and to go in and out, and to lurk there.

The Lords found, No process till Cardross were cited personally, or at his dwelling-house; being then within the kingdom, albeit the first citation was given when he was out of the kingdom.

Vol. II, Page 812.

1680. *December* 10. Mr Edward Wright *against* Edward Ruthven.

Mr Edward Wright, advocate, having right to the escheat of Ruthven of Gairn, pursues a declarator against Edward Ruthven, upon whom the estate of his grand-father, General Ruthven, Earl of Bramford, was settled by Act of Parliament; to declare that estate affectable with 10,000 merks, for which Gairn procured a bill from Robert Murray upon Francis Kinloch, to be paid to Bramford *in anno* 1646; and, for instructing thereof, produced Bramford's letter to Gairn, to raise that money out of Bramford's estate, or otherwise, upon his own or his other brother's credit; and upon several missives acknowledging the receipt of the like sum from Francis Kinloch, he being a factor at Paris.

The defender alleged, No process, upon these missive letters, to infer so great a sum, they wanting witnesses. *2do.* Nothing is produced to instruct that the sum was furnished out of Gairn's proper money. *3tio.* The letters can infer no obligation, unless the bill of exchange, or a bond for the sum, were produced; for the law presumes these satisfied and cancelled, unless they can be produced. Nor can it be supposed that Gairn would have advanced so considerable a sum, without ordering Francis Kinloch to take Bramford's bond, or his receipt upon the bill ordering Francis to pay him the sum; and there being nothing more ordinary than to pay upon retiring bonds or bills, without discharge or missives relating to such bonds or bills, which are never sustained to infer debt without producing the bonds or bills themselves. For the most cautious cannot remember what letters they might have written relating to debts due by them, and desiring forbearance of principal or annual: which, if they did infer debt, albeit the bonds were satisfied and cancelled, they would necessitate the debtor to prove payment by writ; which were impossible.

The Lords found, That these letters were not relevant to prove a debt, without production of a bond or bill of exchange bearing Bramford's receipt of the money.

Vol. II, Page 812.

1680. *December* 10. GEORGE DRUMMOND *against* JAMES DUMBAR.

GEORGE Drummond pursues James Dumbar, messenger, upon this ground, That he had delivered to him a caption to be executed against the Laird of Dundas, and that he had taken Dundas, having the caption; and, at his incarceration in the tolbooth of Edinburgh, had set down, in the book of the tolbooth, that he delivered Dundas as prisoner upon a warrant of the council, and upon the pursuer's caption. Yet Dundas having addressed to the council for liberty, they granted the same; so that, if he were incarcerated upon no other account but their warrant, and appointed the same to be inquired by the tolbooth book. Wherein Dumbar's incarceration upon the pursuer's caption being found, Dumbar was examined, and gave in his declaration in writ,—That he had taken Dundas only upon the council's warrant, whereupon Dundas was liberated. Which being false, and he malversant in his office, and by his means the prisoner escaping, he ought to be liable for the debt.

The defender ALLEGED, 1*mo*. That he had gotten no money. 2*do*. That he had not promised to execute the caption. 3*tio*. That his declaration to the council was true; for albeit, when he took Dundas, he had the pursuer's caption upon him, and another of his brother's, yet, having but five persons with him, and many appearing about Dundas's house, he durst not venture, for deforcement, to produce his brother's or this pursuer's caption, but only the council's order, upon which only Dundas would yield himself.

The pursuer ANSWERED, That a messenger's acceptance of a caption to execute was a sufficient mandate to require his diligence. And that it was a frivolous and false pretence that he took Dundas only by the council's order; for, when he was so taken, he might have declared him his prisoner by virtue of these captions. Likeas, he did book him as prisoner upon the pursuer's caption, and did not declare to the council, as he ought, that he had booked him as prisoner by virtue of that caption.

The Lords found the libel relevant, and repelled the defences.

Vol. II, Page 813.

1680. *December* 10. The LORD BALMERINO *against* The EARL of LOTHIAN.

THE Lord Balmerino,—having filled up the name of John Elphingston in a bond subscribed by the deceased Earl of Lothian, *in anno* 1653,—Lothian suspends, and raises reduction upon these reasons:—1*mo*. That this bond was a defective null paper, blank in the sum, wherein *twenty thousand merks* was filled up, with a distinct hand from the writer of the body, not designed, before the subscription, as filler up; likewise the creditor's name was blank; the lands, where infeftment and security were to be taken, was blank; the names and designations of the witnesses were blank: and found in the custody of Sir Thomas Nicolson, advocate, who tested upon all other sums, without mention of this. So Balmerino had no title to it, nor any other person, unless Sir Thomas had filled up and perfected it, and declared to whose behoof it was, and on what terms it was in his hand; which not being done, though Sir Thomas deceased three years

after the date, the bond was unwarrantably delivered up by James Chalmers, who, at the date, was Sir Thomas's servant; and therefore it ought to have been delivered up to Lothian, as a depositated writ, whereof the terms were never known nor fulfilled. Likeas, by several contracts produced, Balmerino gave ease to Lothian in other bonds, and obliged him to pay Lothian sums; which he would never have done if Lothian had been his debtor in this sum.

The pursuer ANSWERED, That there was no defect in the bond in any essential, seeing the debtor and sum were expressed; and though there was a blank for *hundred* merks, for filling up the odd hundred merks above the 20,000, that could do no more but scoring up the blank, which was done; and the blank for the infeftment of annualrent was declared, by a schedule about the bond, written by Cockpen's hand; and the witnesses being Cockpen and David Murray, they were both known, and had deponed conform to the bond. *2do.* It imported nothing that the creditor's name was blank; that being most ordinary, and doth ever import the haver of the bond to be creditor, and passeth from hand to hand, as current money, without assignations. Nor needs the haver prove the delivery thereof, more than if his name had been filled up *ab initio:* but the burden lies upon the debtor to prove that it was gotten out of his hand unwarrantably. And, in this case, Lothian has never pretended any rational cause upon which the bond was put in Sir Thomas Nicolson's hand; but Balmerino hath both condescended and instructed, that, when this bond was delivered, bonds, extending to a greater sum, were given up to Lothian. And it is beyond question, that there was rolled about the bond a schedule, all written with Cockpen's hand, who was known to be the Earl of Lothian's greatest confidant: and it is not controverted, but if this schedule had been Sir Thomas Nicolson's hand, it would have made the bond to have belonged to Balmerino; for it bears Balmerino's name to be filled up in the bond, and bears the lands to be filled up in the blank for the security; which is equivalent, and rather more than if the schedule had been Sir Thomas's hand: whose declaration might have been suspected, he being Balmerino's great confidant; but Cockpen's could never be suspected for Balmerino against Lothian. And any presumption, through the not completing of the bond, is fully taken off by Balmerino's oath, upon Lothian's desire, and interrogatories how Balmerino got this bond, and for what cause; who has deponed, That the cause of the bond was a greater sum in other bonds delivered to Lothian, as his friends told him when they made the agreement, when he was in England; to which James Chalmers's oath and Cockpen's do agree; so that an oath, being the end of all controversy, there is no more place for presumptions or conjectures. And as to the inferences from posterior contracts with Lothian, they are taken off, by considering Balmerino's condition: whose father was engaged in the most part of the public debts; and his estate being at the ports of Edinburgh, all the creditors fell upon him, and forced him to flee, and did arrest all his sums, wherever they could be found; likewise, Bedford pursued him for vast sums of money; so that it was his interest to conceal this bond, and to let it ly in the hand of his confidant for preservation, in case his estate had been swallowed up. Likeas, Cockpen acknowledges, that, at closing of accounts of the filled-up bonds, Lothian desired a general discharge; which Balmerino refused, upon account of concealing this bond; which hath been the cause, though not mentioned, lest the design might have been thereby prejudged.

It was REPLIED for Lothian, That the bond being blank in the creditor's name, and in Sir Thomas Nicolson's custody, not owned or disposed of by him, nor amongst his other writs, but in another box, in his closet; no man could claim right to it, unless Sir Thomas, the depositary, had declared the terms of the deposition. And no schedule by Cockpen's hand could be equivalent; and, if it could have any effect, his oath could not be refused, to declare upon what terms the bond was granted. And, as to Balmerino's oath, if litiscontestation had been made on any peremptor referred to his oath, and sworn, it had been something; but there is no such thing here, but only an oath *ex officio*, whereupon Balmerino was interrogated how he came to this bond, and if he delivered money at the subscribing of it.

The Lords having, *ex officio*, examined the Lord and Master of Balmerino, James Chalmers, and Cockpen; Balmerino's oath did bear,—That, at the subscribing of this bond in question, he being then absent, his friends who transacted for him, did declare to him, that there being many bonds due to him, by Lothian, for the price of Fairnieherst lands, containing 32,000 merks, or thereby, which were delivered up to Lothian, in place whereof the bond in question was granted. James Chalmers depones, That he found this bond, after Sir Thomas Nicolson's death, in a box, in his closet, with some papers of Balmerino concerning Fairnieherst; and this schedule of Cockpen's about it; which he delivered to the Master of Balmerino, as belonging to his father. Cockpen deponed, That bonds about 30,000 merks were given up to Lothian, by Balmerino's friends, about the time of this bond; and that this bond was trusted to Sir Thomas Nicolson: but the cause of the bonds of 30,000 merks was, that some part of the lands of Fairnieherst, disponed by Balmerino to Lothian, to which Balmerino had not sufficient rights; and that this bond, in question, was intrusted to Sir Thomas for relieving Balmerino of the public debt,—for which he was conjunct with Lothian,—and for Lothian's concourse with Balmerino against Bedford.

The Lords found, by the evidences adduced, That the bond in question was not delivered to Balmerino, but deposited in the hands of Sir Thomas Nicolson; and that no terms of depositation were proven, warranting the giving of the bond to Balmerino: and, therefore, suspended the letters *simpliciter*; and declared the bond null and void.

Vol. II, Page 813.

1680. *December* 15. The LADY KINGLASSIE *against* MR JAMES ALEXANDER.

THE Lady Kinglassie pursues a declarator against Mr James Alexander, for reducing his right of Kinglassie's estate, upon a contravention of a clause in it, upon which he is obliged to call his children Ayton: he did propone a defence, which was sustained upon the 26th day of November last,—That the executions were null, not designing the defender.

The cause being again insisted in, and a new execution produced, bearing his designation, which he was allowed to see in the clerk's hands; he did now ALLEGE, That, having excepted against a summons with the first execution, and his dilator defence sustained thereupon, he was not obliged to answer upon any new execution; but was, in effect, assoilyied *ab hac instantia*, till he were sum-

moned of new, and a new process raised: for albeit the Lords, before interlocutor, will, *ex gratia*, suffer pursuers to mend their executions, and abide by the verity thereof, yet that is but *ex gratia*. And the ancient custom was, when the defender excepted against the executions, if they were defective, he was ever free, *ab instantia*, and not obliged to answer till a new process were raised: much more in this case, where, by interlocutor, the defence was sustained, upon the defect of the execution then produced.

It was ANSWERED, That defects in executions, albeit they may be strictly adhered to by the Lords, yet, *ex nobili officio*, they may allow some alterations; and there can be none more favourable than this,—the addition of the defender's designation, *ubi constat de persona*. And the Lords' interlocutor finds only no process upon the execution produced; but doth not assoilyie *ab instantia;* and, though it did, there is nothing extracted.

The Lords sustained process upon this execution.

Vol. II, Page 815.

1681. *January* 7. OGILVIE of LOGIE *against* JAMES HAMILTON.

OGILVIE of Logie having, by contract, disponed a quantity of victual to James Hamilton, he charges for the price.

James SUSPENDS, upon this reason,—That his receipts of the victual bear expressly, that every boll wanted eleven pounds of weight; whereof he must have abatement, conform to the Act of Council, ordering all bargains between merchants to be by weight.

It was answered, That this bargain was before the Act of Council, although the delivery was after; and, therefore, the delivery behoved to be regulated according to measure, as the bargain was made, and not according to weight.

Which the Lords found relevant.

Vol. II, Page 829.

1681. *January* 11. MR ROBERT LUNDIE *against* The MARQUIS of DOWGLASS.

MR Robert Lundie, as assignee, by Janet Jack, to a bond of 50,000 merks, granted to her by the Marquis of Dowglass, charges the Marquis for payment; who SUSPENDS, and raises reduction upon these reasons, 1*mo*. That albeit the bond bear borrowed money, yet it is notour that Janet Jack was a person of no fortune, but in the Marquis's family; and was never able to lend any sum: and, therefore, unless she can instruct a just cause, the bond must be declared null, and *sine causa*. 2*do*. If need be, it is offered to be proven that the bond was granted *ob turpem causam, scilicet stuprum;* which is reprobated in law. 3*tio*. This bond is discharged; and the discharge is produced long before the assignation.

The pursuer ANSWERED, That all promises and obligations are, with us, effectual; and, if there be no cause onerous, it is always interpreted gratuitous and donative. To the second, the law says, *l.* 4, § 3, *ff. De Condictione ob tur-*

pem causam :—Mulier turpiter facit, quod sit meretrix, sed non turpiter accipit mercedem cum sit meretrix ; and *l.* 8, *ibid. In turpi causa, ex mutua turpitudine, potior est conditio possidentis :* so that Janet Jack having the bond, the Marquis, who is *in eadem turpitudine,* cannot object. *2do.* Though this were relevant, seeing the bond bears borrowed money, it is only probable *scripto vel juramento* of the assignee. And, as to the discharge, there is a reduction against the same produced : *first,* Upon extortion and force, that it was granted by the said Janet when she was kept close in a chamber in Dowglass. *2do.* Upon minority.

It was REPLIED, That the allegeance from the civil law is an assertion of Ulpian, who was a heathen, and is rejected by all Christian nations, and by our custom : and, albeit the parity of the turpitude might hinder restitution, because *potior est conditio possidentis,* yet the Marquis not having paid, he is in possession of the sum *et in potiore casu.* And, whatever might be alleged as to obligements *ex post facto,* which were not anterior to, and the inducements of, crimes, it is notour this bond was granted to induce fornication ; that Janet Jack became an impudent strumpet to the Marquis and others. And, as to the reduction of the discharge *ex metus causa,* it is not relevantly libelled ; but, however, there are produced several letters posterior to the bond, requiring Janet's mother to deliver up the same, in respect of the discharge granted before. And, as to the minority, the discharge bears a promise, upon Janet's great oath, never to quarrel the same ; and, by the authentic *sacramenta puberum,* and by the custom of this kingdom, such oaths exclude the restitution of minors.

It was DUPLIED, That this bond contains only an assertion, but no oath, unless the name of God had been invocated ; and the acting contrary to such assertions, infers no perjury.

The Lords found, That the want of a cause was not relevant to reduce the bond ; but, in respect of the notoriety, that the cause expressed *of money lent,* could not be true, they ordained witnesses to be examined what was the true cause of the bond, before answer as to the turpitude, or as to the oath ; but found, that the letters produced did sufficiently elide the allegeance of the extortion of the discharge.

Vol. II, Page 829.

1681. *January* 13. THOMAS GARVEN *against* DOCTOR TROTTER.

THOMAS GARVEN pursues a reduction of a decreet-arbitral pronounced by Patrick Tailzifer between Doctor Trotter and him, in which Patrick did allow two receipts by Garven, as several payments, where the sums were near one, and the day of the receipt the same ; but, to make them appear two, the date of the one was vitiated.

It was ANSWERED, That the decreet-arbitral is opponed : and arbiters do not insert particular debates and interlocutors in their decreets, nor keep they any thing upon record ; but they do proceed upon the acknowledgment of either parties, and upon such probation as are sufficient to convince good men, although not having all the solemnities requisite in law ; and therefore the arbiter ought to be examined, if these discharges were produced to him, and allowed by him as

distinct, and whether the parties did acknowledge the same, and made objection against them.

It was REPLIED, That this could not be proven but by the oath of party or writ.

It was DUPLIED, That, if this hold, all decreets-arbitral import nothing, seeing they never express the points in debate, nor the probation; but seeing both parties did trust the arbiter, though they may question his opinion or judgment, yet they cannot refuse his oath what was done in matter of fact, or what was produced or acknowledged before him, especially *ex intervallo*; unless, immediately upon intimation, or pronouncing his decreet, they had protested against any particular which he had sustained, either in relevancy or probation.

The Lords, before answer, ordained the arbiter's oath to be taken.

Vol. II, Page 833.

1681. *January 27.* The BISHOP of ABERDENE *against* The VISCOUNT of KENMURE.

THE Bishop of Aberdene, having right to an infeftment of annualrent, in security of 10,000 merks, out of the barony of Corsmichael, pursues a poinding of the ground.

Compearance is made for the Viscount of Kenmure, who ALLEGED Absolvitor; because, before this infeftment of annualrent, the lands in question were apprised by one M'Bryer, whereunto the Viscount of Kenmure stands now infeft by progress from M'Bryer.

It was ANSWERED, That M'Bryer's apprising being disponed to the Laird of Lawers, he ratified this annualrent; and the Viscount, having right by progress from Lawers, cannot quarrel the same.

It was REPLIED, That this ratification is not relevant against a singular successor; for, though Lawers had disponed his apprising in corroboration of this annualrent, it would have had no effect against singular successors, unless Lawers's consent had been a ground of their infeftment; otherwise all singular successors would be insecure, and the excellent statutes for securing purchasers would be elided: for a person, having an irredeemable disposition, may give ratifications, assignations, and back-bonds restricting, which would be effectual, if drawn in question before he were infeft, even against his singular successors by assignation; but, if the matter were not made litigious before infeftment, after infeftment such personal rights from the authors would have no effect against singular successors. And albeit apprisings may be so restricted and affected during the legal, when they are but legal diligences for security, and if they become litigious before expiring of the legal, they will be effectual against singular successors, acquiring right even after expiring of the legal; otherwise the effect of all these personal deeds ceases so soon as the apprisings become irredeemable rights; or else a great part of the securities of the kingdom being founded upon infeftments, acquired from apprisers after the legal was expired, they might all be rendered uncertain.

It was DUPLIED, That this ratification was within the legal; and, being once effectual against singular successors, cannot, *ex post facto*, cease to be effectual by

expiring of the legal. And seeing payment, by intromission or otherwise, within the legal, will still be effectual against singular successors purchasing after expiring of the legal, so must renunciations or restrictions be, which require no registration; and this ratification is in effect a restriction, that the apprising shall not reach the lands in prejudice of the annualrent. *3tio.* This annualrent is homologated by this Viscount of Kenmure, who paid the sum to the Bishop's author, Whitekirk; and M'Bryer's apprising returning in the person of Kenmure, the apparent heir, whose right is within ten years, and so under a legal reversion, by the late Act of Parliament 1661, the ratification is upon the defender's own grounds.

The Lords sustained the ratification and annualrent, ratified by the homologation, being now drawn in question during this new legal: but did not determine the first point, whether the ratification, being within the first legal, would be effectual anent singular successors, after expiring of that legal; for though payment or intromission do continue ever to be effectual, that is by statute. But whether restrictions, voluntary renunciations, or reversions, unregistrate, would be effectual against singular successors purchasing after expiring of the legal, that being a general concernment; the Lords forbore to determine therein, this cause being determined upon the foresaid specialty.

Vol. II, Page 845.

1681. *February* 1. OGILVIE of MILNTOUN *against* MOSSMAN and FORDYCE.

OGILVIE of Milntoun being infeft, as heir to his goodsire, in the lands of Craigduff, did pursue reduction and improbation of a wadset thereof, granted to Mossman, upon this reason:—That it was granted *a non habente potestatem*, his father never having been infeft; in which process he had obtained certification against any pretended infeftment of his father's; which being extracted, he now insists upon this reason of reduction, that the wadset was granted *a non habente potestatem*. The defenders do now produce the father's seasine of Craigduff, and thereupon alleged Absolvitor from the reason. The pursuer opponed the certification extracted before this session, whereby his father's seasine was taken away: and certifications being the greatest security to terminate pleas, and fix rights, it cannot be called in question so long after the extract, albeit a reduction thereof were raised; much less summarily.

The defender ANSWERED, That albeit certifications in improbations are seldom recalled after the full end of the process in which they are granted, as if it be a simple improbation, without other reasons of reduction, where the certification terminates and ends the process; yet where the certification is but an interlocutor, and no definite sentence, and the process yet depending, that certification, upon strong and pregnant grounds, instantly verified, may be summarily recalled; and there can be no more pregnant specialty than in this case, where this pursuer, being apparent heir to his father, and master of all his writs, to shun his father's debts, suppresses his father's infeftment, who bruiked, as heritor, the lands in question, and enters heir to his goodsire.

The Lords reponed the defender against the certification, if he could adminiculate the seasine produced. *Vol. II, Page* 848.

1681. *February* 2. The TACKSMEN of the IMPOST of EDINBURGH *against* ROBERT YOUNG and OTHERS.

THE town of Edinburgh having obtained from the king an imposition of a plack upon each pint of ale and beer brewen within their liberties, or imported within the same, being vented and sold; and there being a complaint, against this imposition, by the College of Justice, and the heritors of the neighbouring shires, there was an agreement amongst them to restrict this imposition to two pennies upon the pint, and reckoning the boll of malt, one with another, to yield twenty gallons of ale, which amounted to two merks on each boll of malt. Likeas it was agreed, that the impost should be paid by all within the liberty of the town, in that way, as being most easy to be known, without multiplying of oaths of the brewers by surveyors; who might from time to time have access to all the brew-houses within the town's liberties, and might gauge their mask-vats how much malt they might brew at a time, and might observe how oft they did brew, and thereby make a constant survey. According to which Robert Young and other two brewers being decerned,—

They SUSPEND, upon this reason:—That the impost by the king being upon the ale and beer vented and sold, there was no warrant to turn it upon the malt; and, though there had, yet it was no ground to presume twenty gallons for each boll of malt, seeing it is known that it could not yield above sixteen gallons of good sufficient ale or beer. *2do.* The impost was only upon ale and beer vented and sold, and this method puts it upon all ale and beer brewen, although not sold: whereas it is known that the brewers themselves have great families, and drink a great share of the brewings themselves, which should be free; and that they have oft-times spoiled browsts that cannot be sold; and frequently their barrels of ale or beer will be returned back to them as insufficient; in none of which cases they can be liable for the town's impost: but now the tacksmen insist against the brewers upon their oaths, and will not be satisfied with a survey; contrary to the settlement.

It was ANSWERED for the Tacksmen, That this settlement having taken effect by a constant custom of twenty years' acquiescence therein by all the brewers, and even by the suspenders, who had the benefit by the settlement; they cannot now resile therefrom, when there is but a year or thereby to run of the impost: nor can they pretend detriment by lifting the impost by malt brewen by brewers, or that twenty gallons is reckoned for the boll; because, the impost being upon every pint of beer or ale, the weakest as well as the strongest was liable. And though there be some small proportion of ale at three shillings Scots, yet it is known that there is a far greater proportion of small ale, and a greater proportion of penny ale; and therefore twenty gallons was fixed, upon the whole; wherein there is an act of the town-council twenty years ago, constantly observed; which is sufficient *inter concives.* And, as to the manner of probation, the law doth allow probation by witnesses, or by oath, at the pursuers' option; and therefore, though the pursuers use a survey, the surveyors are but witnesses, and the pursuers are not obliged to adduce them, but may refer the quantity to the defenders' oaths; especially seeing, *de consuetudine*, the brewers, if they acquiesce not to the survey, are always permitted to give their oaths. *2do.* It is known that the brewers use all devices to deceive the surveyors, by latent vats,

inclosed within a secret room, and not in their ordinary brew-houses, and by moveable eiks to their vats, which they can set on when they mask, and immediately thereafter take off; so that the gauging of their mask-vats by the surveyors cannot reach the true quantity of their brewing. And as to their spoiled brewings, they have always been allowed, upon showing the same to the surveyors. But they can have no abatement upon pretence of their own drinking, seeing all the heritors of the kingdom pay cess to be free of the excise of their own brewing; and therefore no brewer which hath no land can pretend that privilege, nor could any survey clear what were the brewers' own drinking, and therefore all behoved to go to oath. And as to taking back of barrels once sold and delivered, they are not obliged so to do, unless the drink were spoiled when delivered, and then it comes under spoiled drink; but if it be taken back upon the account of the strength, or not being well brewen, it can make no abatement.

The Lords found, That the Act of the Town Council, and long custom acquiesced to, was sufficient *inter concives;* and, therefore, sustained two merks upon the boll brewen by the common brewers: but found, by the same custom, that the survey should be the rule, unless the brewers offered their oaths; and that the spoiled drink should be allowed, upon being shown to the surveyors: but found no abatement to be given upon pretence of the brewers' own drinking, or of taking back of ale or beer once sold and delivered, except upon account of being spoiled: but found, that if the surveyors should discover and find any latent vat, or any moveable eik to a vat, or if such brewers as these were actually found, that such brewers should give their oaths, notwithstanding of the actual survey, as to their preceding brewing.

Vol. II, Page 849.

1681. *February* 2. The MASTER of BALMERINOCH *against* The LAIRD of POURIE.

THE deceased Lord Couper having, by a minute between him and the Laird of Pourie, sold the lands of ————; and Pourie being obliged, for the price, to pay 19,000 merks, or to allow the same in part of payment of the sum of 20,000 merks due by Couper to Pourie; there being mutual pursuits upon this minute, Pourie craved a progress of right, and to be relieved of the non-entry, in respect that the lands sold, holding ward of the Earl of Crawford, were in non-entry, whereupon Crawford and his donatar had obtained decreet of general and special declarator; which being assigned to the Laird of Bandoch, he hath thereby uplifted the full rents of the lands for the year 1671, and sincesyne: and, therefore, Pourie being excluded, did obtain decreet of poinding of the ground, upon his sum of 20,000 merks, out of the lands of Monifieth, sold by Balmerinoch to James Mauld of Balumbie. And Pourie is willing to quit the bargain; or otherwise, so soon as he shall be entered to possession, and the non-entry purged, to pay the 19,000 merks, with the annualrent thereof since he was entered to possession, except the years in which he was excluded by the non-entry: and, seeing the price was alternative, either to pay or allow, *electio*

est debitoris; he will pay, and keep his infeftment on Monifieth, for 20,000 merks, entire.

It was ANSWERED for the Master of Balmerinoch, now succeeding in Couper's right, That Pourie cannot now claim an election; because, by a decreet produced in process, against Couper, he made election to allow; and, though Couper offered to quit the bargain, and that because it was imprestable, Balmerinoch, who was heritor, refusing to concur, yet Pourie rejected the offer: and the Lords decerned Couper to fulfil, and to supply any defect in the progress, by absolute warrandice: and, therefore, seeing Pourie did enter in possession by virtue of the minute, and did continue several years therein, he cannot claim ten years' rent for the non-entry by the warrandice; because he was obliged, by the minute, to procure the infeftment from the superior by his own moyen: and it was offered to be proven that he communed with the Earl of Crawford, the superior, for a gift of non-entry; and the Earl having made him an offer thereof for a small sum, he advised with Sir John Cunninghame thereanent; and that he would get no more for a non-entry than he gave: whereupon he acquainted Bandoch with the communing, who is his cousin-german; and he obtained the gift from the superior, before ever he acquainted the Master of Balmerinoch that he might have proceeded with Crawford on that communing, for both their reliefs.

Pourie REPLIED, That during the dependence of Crawford's declarator of non-entry, he had several times desired the Master to agree with Crawford; who refused, and said, he would not give forty pennies for the non-entry; after which he might warrantably show Bandoch his communing with Crawford, and suffer him to take the right.

It was REPLIED, That albeit the Master, while the matter was dubious, and before sentence, refused to treat with Crawford, being advised by his lawyers he was secure,—yet, after decreet of declarator had passed, Pourie having entered in communing with Crawford, in which Crawford had offered the non-entry for a small sum, he was *in pessimo dolo* not to take it, and enter himself, as he was obliged by the minute; but much more, because, as his oath acknowledges, he was advised, by Sir John Cunninghame, that he would get no more allowed in the price than he gave out; that, without acquainting the Master, he should have acquainted Bandoch, his cousin-german, with his communing with Crawford, who knew nothing of it, and was nothing concerned to take the gift of non-entry, which is now produced, and bears an express obligement to receive Pourie *gratis.* And though, in one clause, it mentions that Pourie should be received upon production of a right, yet there is a posterior clause to receive him simply upon the terms of the old infeftments; which old infeftments Pourie acknowledges, by his oath, were in his hands: all which is against that *bona fides* which is most exuberant in the contract of emption and vendition. Yea, Crawford was taken obliged not to receive Balmerinoch without he were compelled process.

It was DUPLIED for Pourie, That, albeit Bandoch took an obligation of Crawford to receive Pourie, out of his respect, and by no procurement of the Master's; Pourie was not obliged to make use of Bandoch's favour to Bandoch's prejudice, and to the Master's advantage, who had refused to treat with Crawford. And albeit the minute bears, that Pourie should enter himself with the superior, by his own moyen, which is the common style of irredeemable dispositions, and which imports that the composition to the superior, of a year's rent

for the entry, should ly upon the buyer; yet that could not oblige the buyer, unless the seller had infeft himself, and delivered a clear progress, and had subscribed procuratories of resignation, or charters for confirmation; none of which was done in this case.

The Lords having considered these points severally, whether the obligement in the minute, That Pourie should infeft himself by his own moyen, and the superior's obligement and Bandoch's gift, should free the seller of the hazard of the non-entry, which he might have shunned by that bond: which coming to the question upon Saturday was eight days, the Lords found that not relevant to lay the damage of the non-entry upon Pourie. And then coming to the second point of the fraud, in bringing in Bandoch without acquainting the Master, which, by a former interlocutor, they had found relevant to liberate the seller from the warrandice, as to the non-entry; but thereupon Pourie having craved the master's oath of calumny, he did depone, That, during the dependence of the declarator of the non-entry, Pourie had desired him to agree with Crawford; and that being advised by his lawyers, he would be secure, he had refused to treat, but that Pourie had never spoke to him thereof after the decreet of declarator.

The Lords resumed the former interlocutor. And whereas it run in these terms: —That, after an agreement between the superior and Pourie, he could not warrantably acquaint Bandoch to take the bargain, without first acquainting the seller, —The Lords did declare that their meaning was not of an agreement perfected, but of a communing importing an offer by the superior; and they did adhere to the former interlocutor. And having reëxamined the Master, he deponed, That neither during the process of declarator, nor any time thereafter, did ever Pourie, nor any from him, acquaint the Master of any communing with Crawford anent the non-entry; nor did he ever know thereof, till Bandoch had obtained the right.

The Lords found, That that oath of calumny did not prove that Pourie did acquaint the Master of his communing with the superior; and that, having entered in possession of the lands upon a minute of sale, he could not warrantably bring in another to take the gift of non-entry, whereby he was excluded from his possession, unless he had first acquainted the seller with his communing; in which case, if he did either refuse or neglect to follow the communing, and purchase the non-entry, the buyer was blameless and free, though he acquainted a friend to take the non-entry. But, because the Master's oath was only an oath of calumny, the Lords remitted to Pourie's probation, whether or not he acquainted the Master of the communing with Crawford anent the non-entry, *scripto vel juramento*; and ordained Bandoch to depone what he paid to Pourie for the non-entry; and found the Master liable, by the warrandice, to pay Pourie what Bandoch paid to the superior, and no more.

Vol. II, Page 850.

1681. *February* 4. M'KENZIE of SUDDIE *against* The COUNTESS of SEAFORTH.

MACKENZIE of Suddie, having confirmed himself executor-creditor to the de-

ceased Earl of Seaforth, as being cautioner for him, and distressed, pursues for delivery of his moveables.

The Countess of Seaforth, having confirmed herself executrix-creditrix, also compears, and ALLEGES, She ought to be preferred; because Suddie, not having paid the sums in which he was engaged cautioner, as he could not have poinded the Earl's goods unless he had paid, so neither can he claim the same goods as executor-creditor: otherwise the debt might be satisfied by the Earl's goods, and yet the Earl not liberated of the debt, but put to an action against his cautioner to purchase him a discharge; whereas the Countess hath confirmed upon most privileged debts, such as the Earl's funeral expenses, to which she was assigned.

It was ANSWERED, That Suddie, having the first confirmation, which is a decreet of the commissaries standing unreduced, there is no place for the Countess her posterior confirmation for the same goods; but Suddie would have the sole administration, though he had been a mere executor-dative. *2do.* He offers, before he extract, to produce a discharge, from the Earl's creditors, to his successors, of the equivalent sum.

The Lords preferred Suddie to the administration, he producing a discharge before he extract; but allowed the lady to be heard upon the funeral charges, which is a preferable debt to all others, not as executor, but as a creditor.

Vol. II, Page 855.

1681. *February* 9. SIR JAMES COCKBURN *against* The LADY CRUMSTAIN.

THE Lady Crumstain having pursued a declarator against Sir James Cockburn, which being disputed in the Outer House, and the Ordinary having ordained some writs alleged upon to be produced before answer;—which being now produced, the Ordinary having called the cause again,—

It was ALLEGED for Sir James, That writs being produced upon an act, the Ordinary could not determine thereon, but only the Lords *in præsentia.*

It was ANSWERED, That here was no act of litiscontestation, nor an act before answer equivalent thereto, but only a warrant to produce writs which were in the parties' hands, that an allegeance might be founded thereupon, according to the tenor of the writs.

The Lords found, That this being no act of litiscontestation, or equivalent thereto, the Ordinary ought to hear the parties upon the writs produced.

Vol. II, Page 857.

1681. *February* 9. GEORGE COCKBURN *against* WEEMS.

GEORGE Cockburn having obtained a gift, of the King, of the cocket-office, empowering him to give cockets to all ships loosing in Fife; there arose a competion betwixt this gift and a prior gift given by the Exchequer, of the same of-

fice, to umquhile James Weems and his son James Weems conjunctly, and to the longest liver.

It was ALLEGED for Cockburn, That the cocket-office, being a known fixed office, was only communicable by the King's gift under his own hand; and the commissioners of Exchequer have no power to gift the same.

It was ANSWERED, That though the commissioners of Exchequer had no special power to gift offices, yet they have a general power to manage the King's revenue, and consequently to do all things necessary for that effect: which extends to the cocket-office; seeing by the cocket the loading is known, and thereby the custom of the export.

It was REPLIED, That though the Exchequer may give commissions, in so far as is necessary for administration of their own commission, yet that can extend to no fixed office; which the King himself can only gift: for, though the Lords of Session have the power of administration of justice, which necessarily requires clerks and macers, yet they cannot gift the place of a macer, neither can the council name their macers. So that the giving of cockets not being an ambulatory commission, but a settled office at the King's gift, the Exchequer cannot gift it, unless they had special warrant, much less can they gift this office with a conjunction or substitution. *2do.* Weems is inhabile, as being at the horn.

It was DUPLIED, That being at the horn doth not incapacitate to exerce such an office; and Weems hath assigned it to the Lord Burntisland; and may exerce the same by a depute.

The Lords found, That Weems's gift not bearing a deputation, he could not make a depute. And having called for the commission of Exchequer, they found that this gift was not warranted thereby; and therefore preferred Cockburn upon the King's gift, unless Weems will prove, that, by long custom, the Exchequer hath been in use to give such gifts of the cocket-office as this formerly to others.

Vol. II, Page 857.

1681. *February* 9. CUNNINGHAM *against* His CREDITORS.

THE Lords having appointed the keeper of the minute-book to uplift and pay the macer's dues,—several creditors of Adam Cunningham, one of the macers, arrested the same in his hands, and pursued to make forthcoming.

It was ALLEGED for the macer, That these dues being his fees for his service, they were alimentary, and necessary to him to exercise his office; and they being paid in smalls, the keeper of the minute-book could not positively depone what was in his hand, at every arrestment.

It was ANSWERED, That the macer's place being lucrative more nor necessary for his aliment and service, his creditors could not be excluded upon that pretence; and there is no reason that a macer, bruiking office by the King's gift, subservient to the distribution of law and justice, should not be law-biding.

The Lords found the macer's dues arrestable; and appointed the keeper of the minute-book to count therefor yearly, the first day of January, the first

day after Martinmas, and at the first of August: and that the arresters should be preferred according to their priority as to every running term, and not as to every particular due, as it was paid to the keeper, but for the whole term.

Vol. II, Page 858.

1681. *February* 17. The TOWN of BRICHEN *against* ARBUTHNET.

THE Town of Brichen having obtained a gift, from King James, of the chaplainries belonging to the cathedral kirk of Brichen, for the use of their hospitals; they did pursue reduction and declarator of their right to the chaplainry of Cadhame, and to the mill-lands of Cadhame, belonging to Findoury, as a part of that chaplainry, and against the Earl of Southesk, as pretending right to the said chaplainry; in which summons there was also improbation. Whereupon they obtained certification, which was extracted; and the cause now being discussed, "The Lords declared, that the pursuers had right to the chaplainries of Cadhame, and to the feu-duties of the mill-lands of Cadhame.

Whereupon Findoury ALLEGED, That it ought to be declared, That the certification should not be prejudicial to his right of property, but that he should be reponed against the same:—1*mo*. Because certifications in improbations contained in the same process with reductions and declarators, are always dependent till the reductions be discussed or passed from; and therefore the Lords used to repone against certifications extracted, while the principal process is insisted in, and the plea not ended. 2*do*. Certifications in improbationns joined with reductions or declarators, do not simply improve the writs called for, but only in order to the conclusion of reduction of these declarators; and therefore though certification be extracted, it hinders not to make use of the same writs as to all other effects. So that the conclusion of this declarator being, by the Lords' decreet, determined to declare the town's right to the feu-duty to the mill-lands of Cadhame, the certification cannot be made use of against Findoury's property, who now produces a progress of 100 years to the property; neither can the King's gift make the town superior, but only give them the right to the feu-duties, the King remaining superior by the Act of Annexation; and the Town can be in no better case than the lords of erection.

It was ANSWERED for Brichen, That certifications in improbation being the great security of the lieges to free them from the pretence of other rights, have been ever adhered to, though in absence; much more where this defender appeared, and the certification was extracted several years ago. Nor is it competent now to debate the pursuer's title, nor to question the certification extracted summarily, any ways but by reduction.

The Lords declared, That the certification should not prejudge Findoury of the right of property: in respect of his progress produced, against which nothing is objected; and that the decreet of the Lords hath only declared the right of the feu-duty to belong to the town.

Vol. II, Page 861.

1681. *February* 18. JAMES ALSTOUN *against* WALTER RIDDEL.

JAMES Alstoun pursues Walter Riddel sub-clerk of the bills, for payment of a sum due by Broomhall, which being suspended, he, for a cautioner, did accept of a false bond in name of William Norvel in Culross, who is dead several years before, without any attester; albeit the pursuer required him, by instrument, to take sufficient caution; and being upon the place, as the instrument did certiorate, Walter ought to have known the cautioner, or had an attester; or at least ought to have acquainted the pursuer what cautioner was offered, who would have told him that the cautioner was dead several years before the date of the bond of cautionary.

The defender ALLEGED, That he was not liable, seeing it is known that there was such a responsal person dwelling in Culross, in whose name the bond of cautionary was offered; and he could not know the certainty of his death, or know his hand-writ: and denied the truth of the instrument, which is not probative, unless it were asserted by the witnesses, seeing it hath no warrant in writ.

The Lords having ordained the procurator, the notary, and witnesses to be examined upon the truth of the instrument; one of the witnesses was dead, and the other deponed he remembered not; but the procurator deponed, that the contents of the instruments were true; and likewise the notary, Cairns, who was *suspectæ famæ:* and there were two declarations produced under his hand, acknowledging two instruments formerly given out by him to be false: Whereupon the question arose, whether the instrument was astructed or improven.

The Lords found the instrument astructed, albeit it had but two witnesses,—the one dead, and the other remembered not; seeing the notary and procurator, though suspected, astructed the same: for, if instruments were improven, when the witnesses depone they remember not, but are not positive that they were not witnesses, or that they were not in that place; most of instruments, even of seasine, resignation, and the like, would be improven; seeing it is impossible for witnesses that are but overly required, to remember for any considerable time, not having subscribed the instrument, that by their knowledge of their subscription they might affirm the same.

Vol. II, Page 862.

1681. *February* 25. MR GEORGE BANNERMAN *against* DUNDAS of MORTON.

MR George Bannerman pursues reduction of a decreet absolvitor upon a process at his instance, against one Hamilton, as principal, and Dundas of Morton, and Hugh Sinclair, cautioners in a bond, whereunto he had right by progress: the cautioners were assoilyied; the reason of the decreet being, that he passed from them. The reasons of reduction were, *first*, That this decreet was unwarrantably extracted, having been scored in the minute-book, as yet appears by the same, and being extracted after Mr George went abroad. *2do.* Because the assertion of the clerk cannot instruct that he passed from the cautioner, un-

less it had been subscribed under his hand; for, though the assertion of the clerk may instruct a passing from *pro loco et tempore*, which only *perimit instantiam*, yet it cannot a passing from *simpliciter*, which *perimit causam*. 3tio. The decreet, being unwarrantably extracted, must be turned into a libel; at least turned back unto the minute, as if it had not been extracted; and therefore, albeit the pursuer had passed from the cautioner simply, he may resile before a warrantable extract.

It was ANSWERED, to the *first*, That the scoring of the minute-book can prove nothing *ex intervallo*; but this decreet was pronounced four years ago; and it were of dangerous consequence to reduce decreets, if not recently quarrelled, upon scoring them in the minute-book, which might be done by any hand; and there is no reason to put all decreets in the power of the keeper of the minute-book. To the *second*, Whatever is ordinary to be proponed without writ, is sufficiently instructed by the clerk's minutes, and extended decreet; for, upon his assertion, depend all the interlocutors, both of relevancy and probation, and it is very ordinary to pass from some defenders *simpliciter*; but, if there were a decree of consent of special nature, it behoved to be upon a subscribed warrant.

The Lords considering that the decreet was extracted when Mr George was abroad, they did take the oath of the keeper of the minute-book; and he deponing *affirmativè*, they did repone against the decreet, as if it had been unextracted; and found that Mr George might resile before a warrantable extract: and so had no need to determine whether his passing from *simpliciter* required his subscription.

Vol. II, Page 868.

1681. *February 25.* The COMMISSIONERS of the BORDER *against* ELLIOTS.

THE Commissioners of the Border having apprehended Robert Elliot upon an accusation of theft, there were two Elliots gave bond to present him to the Border-court, at Jedburgh, the 25th April 1676, or at any other time or place thereafter the Commissioners of the Borders pleased, under the pain of 5000 merks, upon six days warning, allenarly. And, in 1680, they summoned them, upon six days, to produce him again at Jedburgh; and, upon their failyie, decerned them in 5000 merks. And having obtained letters of horning upon the said decreet, by deliverance of the Lords, and having therewith charged the said cautioners, they gave in a bill of suspension. And the Lords having appointed the cause to be heard upon the bill, before report, there was an address made to the council, that the council would, by their act, prohibit the meddling with the sentence of the Commissioners of the Border: they being a commission of many eminent persons and having their commission under both the Great Seals of Scotland and England, and being a supreme criminal court, not subordinate to the Justice-General,—the Lords of Session, who have no criminal jurisdiction, could not meddle with their sentence, but should refuse all bills of advocation or suspensions thereanent.

The matter being debated in council sharply enough, it was shown, That the Lords of Session were the King's ordinary council in matters of right, as the

council were in matters of state and public peace; and therefore they might, and did supply the defect of any criminal court; and therefore letters of horning did pass upon the Lords' deliverance upon all pecunial sentences of the justice-court; and no other could suspend these sentences, even upon obedience. Likeas, the Lords have advocated causes even from the justices, when the justices were concerned in the cause before them as a party, or had near relation to the parties, or was in enmity with either of them; though the Lords could not judge these causes, as being criminal, in name of unsuspected judges. For that cause, much more might they suspend the letters given out by themselves upon a pecunial matter of the Commissioners of the Border. And though there was a commission by the King, under the Great Seal of Scotland, to so many Scots and English, and under the Great Seal of England, to the same persons, yet they did not become a third kind of judicatory from both kingdoms: but, when they sat in Scotland, they sat by the Great Seal of Scotland; and even the English were become Commissioners of Scotland; and, when they sat in England, the Scots were Commissioners of England, and behoved to keep the laws of either kingdoms that they sat in, though they might keep the fits and customs of the Border.

Whereupon the Privy-Council did not concur in that motion; but recommended it to the Lords of Session to be tender of discouraging the Commissioners of the Border.

And now, the cause being called, the Elliots repeated their reason of suspension, That the decreet of the Commissioners of the Border was most unjust and unwarrantable, having decerned the suspenders in the failyie of 5000 merks for not producing of Robert Elliot upon six days' warning, when they were out of the kingdom, and therefore no less days were requisite than sixty; for even charges of horning upon bonds bearing a charge of six days only, must proceed upon sixty days against persons out of the country: and Robert Elliot himself was not cited.

It was answered, 1*mo*. That, albeit sixty days be required to cite and charge persons who are notourly out of the kingdom, yet that cannot be extended to the inhabitants upon the Border, who may pass the Border oft-times every day; and therefore a citation at their dwelling-house must be sustained, unless it were notour in the country that they had been long absent out of the kingdom. And it would exceedingly retard the commission, if citations at the market-cross of Edinburgh were requisite upon sixty days. *2do*. Though there had been any informality, decerning the penalty to be incurred, yet, it being a liquidate penalty in the suspender's bond, it is incurred upon the cautioners not presenting Elliot at Jedburgh the 25th April 1676. For, albeit it be subjoined to their bond, "or at any other time or place the commissioners pleased, upon six days' warning," that did not import an alternative obligation in the option of the cautioners, but was absolutely in the option of the commissioners, when they pleased; and, therefore, Robert Elliot, having neither been offered at Jedburgh the 25th day of April, or any time since, the Lords, in justice, ought to find the letters orderly proceeded for the liquidate penalty.

The Lords found this answer relevant, and therefore found the letters orderly proceeded; but had not the occasion to determine the other point, concerning the days of the charge requisite on the Border.

Vol. II, Page 868.

1681. *June* 7. GEORGE WEDDELL *against* GEORGE SALMOND.

GEORGE Weddell, having married his daughter to George Salmond, and paid the tocher, pursues Salmond for repetition of the tocher, because the marriage was dissolved within year and day. The cause was disputed the 25th day of February 1680;—

And the Lords found, That, if the year was complete, and the day after the year begun, the husband should have the tocher; otherwise that it should return to the father. But the point to be proven being so narrow as the precise time of the woman's death, the Lords allowed witnesses, *hinc inde*, to be examined upon the time of her death; and both men and women were allowed as witnesses *ex officio*. And being this day advised, it was proven, That the marriage was solemnized upon the 23d day of November, betwixt eleven o'clock and one in the afternoon; and that the woman died upon the 23d day of November, about ten or eleven o'clock at night, in the next year. Whereby the question came, Whether the marriage had stood undissolved for a whole year, and a part of a day after the year, or not. And whether the year was to be reckoned *de momento in momentum:* so that, the marriage being solemnized about twelve o'clock the 23d day of November, if the wife lived a twelvemonth, *viz.* 365 days and six hours, and an hour more, it would be sufficient to reckon *de momento in momentum;* or, whether the reckoning should be *calculo rotundo*, by the full number of the days of the year in which the marriage and death occurred, without consideration of hours or moments.

The Lords found, That the adjection of a day to the year was to shun the debate of hours or moments; and therefore found, that it being proven that the woman was married the 23d day of November, and died the 23d day of November the next year, there could not be two twenty-thirds of November in one year; and therefore the woman lived one year, and a part of the day of the next year; and so the tocher was found to belong to the husband, and he was assoilyied from repetition.

Vol. II, Page 871.

1681. *June* 8. The KING'S TRUMPETERS *against* The BISHOP of CAITHNESS.

FERGUSON and others, having a gift, from the King, of being his Majesty's trumpeters, and all emoluments thereto belonging; having obtained general letters thereupon, they charge the Bishop of Caithness to pay 100 merks, as being the due and accustomed allowance to the trumpeters for every Lord and Bishop at their obtaining of their dignity to be Lords of Parliament.

The suspender ALLEGED, That, albeit some of the bishops, by way of gratification, might have given the King's trumpeters what they thought fit at their entry; it cannot induce a burden upon the Order, nothing such being imposed by law or custom. For, albeit there be an Act of Parliament of the dues payable to the Lyon, by all temporal lords, at their erection; yet that Act mentions nothing of the bishops, being but for life, nor any thing of the trumpeters.

It was ANSWERED, That the dues of all offices of the kingdom are only by

their gifts in general, with all emoluments; which are ever sustained as the emoluments are proven to be accustomed; and the Act of Parliament anent the Lyon is not exclusive or prejudicial to the trumpeters more than to other offices.

The Lords found, That, if the payments made by the bishops were not ordinary and uniform, as a fixed due of 100 merks, they were not liable; but, if it was a constant fixed duty, paid by all the bishops at their entry, and not by some more and some less, they sustained the libel, if it were so condescended, and allowed the pursuers warrant and diligence to adduce all evidents and adminicles thereanent.

Vol. II, Page 872.

1681. *June* 23. CRAWFORD of ARDMILLAN *against* The LORD BARGENY.

CRAWFORD of Ardmillan, having charged the Lord Bargeny for payment of a sum contained in his bond;—he suspended, and ALLEGED Compensation, and payment of a part.

Which being found relevant, and a term assigned; at the calling of the act to circumduce the term, Bargeny produceth some writs; and Ardmillan, by supplication, ALLEGED, That they had no contingency with the reasons, but were produced of purpose that the cause might go to the roll of concluded causes; which would make a long delay ere it came in of course; and, if any thing proper were produced, the desire of this decreet would be for the superplus. Which being remitted to the Ordinary, he reported, That there was nothing had contingence but a compensation of 32 merks. Whereupon the question arose, Whether the charger, allowing that, should have decreet for the rest, without abiding the roll.

The Lords found, That, when acts were called for circumducing the term, when any thing was produced, the Ordinary, before he made a great avizandum whereby the cause was concluded, ought to allow the other party a sight of the production; and, if the other party was content to allow the same, and that there was a clear superplus, the Ordinary ought to decern for the superplus, if the party required the same; and, if the party would not allow the partial production, make avizandum thereupon only; but if the party suffered avizandum to be made *simpliciter* in the cause, the Lords would not consider the cause before it came in course: otherwise they would be necessitated to advise causes twice; *first*, whether the writs were contingents; and *next*, whether the writs proved: which were most inconvenient, and contrary to custom.

Vol. II, Page 882.

1681. *July* 14. JAMES BARTHOLOMEW *against* MARGARET BARTHOLOMEW.

MARGARET Bartholomew having served an edict for choosing of curators before the Sheriff of Renfrew, James Bartholomew, her father, pursues advocation thereof on this reason, That he, as father and lawful administrator, is the only

tutor to his daughter in her pupillarity, and curator in her minority; and, therefore, without his consent there can be no other curators chosen.

It was ANSWERED, That the daughter hath lands, not flowing from the father, with the rents whereof the father hath intromitted.

The Lords found, That the father, as lawful administrator, was curator; and therefore advocated the cause; but declared, that they would give the daughter curators *ad lites* for clearing accounts of the father's intromission.

Vol. II, Page 890.

1681. *July* 19. The CHIRURGEONS of EDINBURGH *against* The APOTHECARIES.

THERE were mutual declarators betwixt the chirurgeons of Edinburgh and the apothecaries there, for declaring their privileges.

The chirurgeons insisted, That it might be declared they had the only power of phlebotomy, and application of sear-cloths to dead bodies; and that they might prove the transgression of these privileges against the apothecaries, not only by deprehension of them in the fact, but by witnesses and their oaths; and produced very ancient seals of cause by the town of Edinburgh, giving them the privilege of blood-letting, and all manual operations upon men's bodies. And that they have been immemorially a deaconry, and one of the chief deaconries of the fourteen established by King James the Sixth his decreet-arbitral: whereas the apothecaries are no deaconry, and enter not by apprenticeship, but were of late erected in a fraternity, and visitors appointed, that every person might not exercise pharmacy, but only such as the visitors should find skilled; so that no merchant or tradesmen in Edinburgh can be hindered to exercise pharmacy, if the visitors find him skilled; and therefore many of the ablest chirurgeons are also apothecaries, their employments being more congenious. And that the apothecaries' privilege in Edinburgh is by consent of the chirurgeons, by which they got liberty to make sear-cloths for dead bodies; which was not proper to them, but by the chirurgeons' consent; and with express provision, that the chirurgeons should only apply these sear-cloths.

The apothecaries insisted to declare that they had power of phlebotomy, upon occasion of any inward disease: and that the chirurgeons had only the power thereof in relation to wounds, ulcers, or outward diseases: and that they had power to apply sear-cloths, seeing it was the great interest of the lieges not to be put to the expenses of having both apothecaries and chirurgeons to double their expenses. And therefore, if apothecaries did prepare medicines for inward diseases, if the patient had need of letting blood, there was no reason to call in chirurgeons; and, if apothecaries made sear-cloths, the lieges should not be put to the expense of calling for chirurgeons to apply them; for chirurgery gives only right to manual application upon the bodies of the living, but the wrapping up of dead bodies requires no special skill, even though their fleshly parts were to be cut off for preservation of the corpse. *3tio.* By the custom of all nations, inquiry after encroachments upon particular trades is only by deprehension in

the fact; and oaths or witnesses are excluded in such cases; which would raise perpetual pleas, and, if sustained, could terminate in no less than 40 years: and therefore none of the trades of Edinburgh can challenge others, except they be deprehended in the fact; and much more should be indulged to pharmacy, which is a much more liberal profession. *4to.* That no person should be both chirurgeon and apothecary, which would confound these employments, which are everywhere distinct; and as no man can exercise two trades in Edinburgh, much less pharmacy and chirurgery, which require much study and long experience, and either of them is sufficient for one man's skill; so that the chirurgeon-apothecaries, who but study chirurgery, and are bred therein, will but neglect pharmacy, and the single apothecaries will have no employment or encouragement; seeing the chirurgeon-apothecaries, exercising both employments, will still be made use of for all.

It was ANSWERED for the chirurgeons, That whatever might be pretended as to the privilege of these employments abstractly, or if both were *in pari casu*, yet here the chirurgeons are an ancient deaconry; having express privileges and immemorial possession, and confirmations of Parliament; which cannot be derogated from by a new erection of the fraternity of apothecaries, further than consent or ancient custom hath given them; which was never to phlebotomy, except in the case of necessity, where chirurgeons could not be had, or of charity to the poor. And the lance is a proper instrument of chirurgery, and a manual operation upon the body, and requiring singular skill; for, by piercing of an artery, many persons have lost their lives. And, as to sear-cloths, chirurgeons might as well make these as plasters applicable to the living; but, seeing they have yielded them to the apothecaries, they will not contend: yet, since they expressly reserved the application, the apothecaries have no pretence thereto; for they could not pretend the skill or power of exintrication, or any incision upon the body: and even when these are not, the chirurgeons have only skill to know what is requisite to preserve corpses, and to make incision when necessary; and when not, to stop the passages of nature. Neither will the pretence of more expense confound distinct trades; and the difference will be inconsiderable: for the parties concerned will give but to both that which they would give to one. And, as to the manner of probation, it is certain, that whatsoever is just is probable by oath, except a contrary privilege be attained by ancient possession: as it is amongst the ordinary trades, where deprehension may, without inconveniency, be effectual; seeing these trades have or carry always some instrument belonging to their own trade, which may be deprehended; but, in phlebotomy or other manual applications, the apothecary needs carry no instrument but a lance, or such other instruments as he may carry in his pocket: and the acts are subite and transient; and it would breed great disturbance to thrust in upon patients to search whether any were letting blood of them, or exercising other acts of chirurgery. And, as to chirurgeon-apothecaries, they are as ancient as the privilege of apothecaries in Edinburgh, and very necessary for the ease, and saving expenses to the lieges.

The Lords having appointed some of their number to speak with the doctors of medicine, who did report their opinion; which was,—that phlebotomy was proper to the chirurgeons, except in the case of necessity or charity; and the application of sear-cloths, where incision was made upon the corpse: but other-

wise, that apothecaries might apply the same; and that oaths were not allowed to any party any where; and that it was a great inconvenience to the lieges, and to both employments, that one person should exercise both :—

The Lords found, That the chirurgeons of Edinburgh had the only power of phlebotomy, except in the case of necessity or charity, in so far as concerned the citizens of Edinburgh: But whether the same was to be extended to the suburbs or to the inhabitants not being citizens, they ordained the parties to be further heard; and found the apothecaries might apply sear-cloths where there was no incision, and the chirurgeons only where incision was to be made. And, as for the manner of probation, and conjunction of the employments, they ordained the parties to be further heard; but that forbearance should be *medio tempore*, as to the particular manner of probation.

Vol. II, Page 892.

1681. *July* 19. JOHN BURTON *against* MR ALEXANDER BURTON.

JOHN Burton, having raised a brief of idiotry or furiosity against Mr Alexander Burton, his brother; and, accordingly, an inquest being called by the Bailies of Edinburgh: Mr Alexander, having given in a bill of advocation upon this reason, That this unjust design of his brother was to enhance his estate, and restrain his person; and being of the greatest moment to him as to his fortune, liberty, and fame, it ought to be advocated from the Bailies, who have called a number of obscure persons upon the inquest; that the Lords may remit the brieves to the macers, and appoint assessors, as is ordinary in brieves of difficulty and importance :—

The Lords advocated the brieves *in statu quo*, and gave commission to the macers to serve upon the same day which was appointed by the Bailies, and to make use of the persons of the inquest, if they found them qualified; and named three of their number to be assessors.

The macers having kept the diet, it was ALLEGED for Mr Alexander Burton, That the service of the brief could not proceed; because, before the raising thereof, he had raised a declarator before the Lords that he was *compos mentis*, and so was neither idiot nor furious; which is prejudicial, and ought to be first discussed, and is, in effect, a precognition necessary for preserving the reputation of the lieges against the groundless pretensions by such brieves: which pass of course, and whereby any man, how judicious soever, may be brought before an inquest as an idiot, or furious person, and be thereby abused and disgraced: So that, if the Lords, upon the declarator, find Mr Alexander to be *compos mentis*, they ought simply to discharge the service of the brief.

It was ANSWERED, That, in this case, there is sufficient ground to raise the brief; Mr Alexander having been, by the Privy Council, appointed to be restrained and kept by his brother, upon extravagant letters of his, read in council; and, therefore, the law of the kingdom having prefixed a peculiar form for trial of the discretion of the idiotry or furiosity of any person to be by brief and inquest, it cannot be otherwise determined by a declarator more than a

service of heirs; and, therefore, the Lords have done all that can be done, by appointing assessors of their own number in all their procedure, and without whom the macers cannot proceed.

The Lords repelled the defence: but allowed Mr Alexander, upon the declarator, to cite witnesses before the inquest; to instruct that the extravagant acts alleged upon were done when he was drunk, and that when he was out of drink he was *sedati animi*.

Vol. II, Page 894.

FOUNTAINHALL.

DECISIONS

OF THE

LORDS OF COUNCIL AND SESSION,

REPORTED BY

SIR JOHN LAUDER,

LORD FOUNTAINHALL.

PARTLY TAKEN FROM FOUR MSS. THE CONTENTS OF WHICH HAVE NEVER BEFORE BEEN PRINTED; AND PARTLY CONSISTING OF THOSE CASES IN THE TWO PRINTED VOLUMES OF LORD FOUNTAINHALL'S DECISIONS, WHICH WERE NOT INCLUDED IN THE DICTIONARY OF DECISIONS.

DECISIONS

OF THE

LORDS OF COUNCIL AND SESSION,

REPORTED BY

SIR JOHN LAUDER, LORD FOUNTAINHALL.

1661 *June.*

After two years surcease of justice, the Parliament called by King Charles the Second, (whom God preserve!) did sit down, the 1st of January, 1661, the Earl of Middleton being his Majesty's Commissioner therein; when, according to old custom, there were *domini ad articulos, et domini ad interdicta et judicia;* the first meddling with civil and criminal matters, the other only with matters civil. But the long want of justice, through the confusion of the times, occasioned a great number of pleas merely civil before the Lords of the Bills: who, being a Parliament, did not tie themselves to law; but, upon complaints most informal, they ordinarily reduced decreets given by the Lords of the Session in 1649, and by the English Judges: which occasioned much clamour against them, especially against my Lord Cochrane, who was President thereof, for his forwardness that way. Before this Court there were commenced a number of criminal actions, containing a civil conclusion, or rather civil actions on a criminal mode, which they ordinarily referred to parties' oaths, to infer the conclusion: contrary to the custom in criminals, where parties are not tied to give their oath to in-

fer any punishment. Yea, they proceeded so irregularly in Pittarro and Craig's case, that they did not so much as examine the witnesses upon oath, but took their naked declarations. Zenocrates at Athens was dispensed with. See this at large *alibi*. *Vide Gardener* against *Tenant, July* 7, 1677.

Among other questions this fell in to be debated, if the probation of a criminal *medium*, with a civil conclusion, in a civil court, might be repeated in a criminal court to infer punishment: which they found not relevant; but that the parties might object against the witnesses in the criminal court, and to them examined in his presence; which is not permitted in a civil court

Before the Lords of the Bills there was a disposition reduced by the laird of Craig against Pittarro, *super capite fraudis et circumventionis*, and they had made him drunk when he gave it; the disposition bearing the receipt of L.10,000 as the price, whereas he never received a denier. But the decision and the manner of it were more in a parliamentary nor a juridical way.

Before the Lords also, in the case of Montrose and Argyle, it came to be debated, whether, if a forfaulture be reduced *ab initio*, and declared null, and the very authority itself by which he was forfaulted evacuated, if in that case the donator to the forfaulted person ought to be countable to the person restored, not only from the date of his restitution, but from the very day and date of the forfaulture. ALLEGED for the donator, He was *bonæ fidei* possessor, *qui fructus perceptos facit suos;* my Lord Argyle having got the gift of Montrose's forfaulture from a parliament reputed and holden for the time to be a lawful parliament, and by virtue thereof twenty years in possession: as in a decreet of reduction of an infeftment, the defender is only liable from the act of *litis-contestation*, if sentence follow thereon; though the decreet bear the infeftment craved to be reduced, to have been from the beginning, to be now, and in all time coming, null and of none avail, &c. ALLEGED for Montrose, There was a difference betwixt a restitution *ex gratia*, and *ex justitia*, and where the authority by which the forfaulture was pronounced is *funditus* taken away: in that *ex gratia*, it is true, the donator *fructus facit suos;* but not in that *ex justitia*, which is Montrose's case. Farther alleged, It is of dangerous consequence to bring men upon the stage, for giving active obedience to acts of Parliament, reputed and holden to be lawful for the time, and a long time after, though rescinded.

There were many pleas of this nature before the Lords of Articles, and bills against particular persons, for fines and forfaultures and wrongs done from the 1638 to 1651 and 1660, and for particular murders and slaughters and burnings, done twenty years before; wherein parties were very earnest, for fear the act of indemnity should pass before the closing of their processes: and the Commissioner was forced to put a demurr upon these actions till the King's mind should be known thereanent.

Advocates' Folio MS. folio 50.

1661. *June* 27. The TOWN of BERWICK and the GENTLEMEN of the MERSE *against* SCOT of Haining.

THIS day there was a debate betwixt the Mayor of Berwick and the gentlemen of the Merse dwelling on Tweedside, against the Laird of Haining, upon a complaint given in by them against him, representing that how he by the draining of a loch, belonging to him, of a mile of compass, has defiled the pure water of Tweed with its stinking water, and scared the salmon fishings both upon the one and the other side of the river, which are valued to L.1000 Sterling per annum; thereby not only prejudging private men in their profit, but the whole country thereabout, and the King's customs in England, which are augmented by the exporting of salmon. This complaint being called, the parties were ordained to be heard before the Lords of Session,—first, to dispute upon the relevancy: where it was debated in law, if a man might, to the prejudice of his neighbour and the public, dispose upon his own property.

ALLEGED for Scot of Haining,—That it was against the freedom of dominion, which gave to every one the faculty to dispone on his own as he pleased, and that the use of this dominion was as free and as ancient as the creation itself; for which many lawyers are cited; and that it were to evert the definition of dominion in law, and to take away the constitution of servitudes on men's properties, which are introduced either by paction or patience of the landlord, or by custom past memory of man; so that Haining being master of the ground and loch, and land lying adjacent thereto, he might *de jure* dispose on his own dominion, and drain the loch, by making a passage in his own land for conveying of the water in the loch, which fell in Ettrick, and by the means of it then into Tweed, forty miles distant from Berwick. So that two things came to be disputed: Whether *de facto* it was true that the stinking water of the loch of Haining could at such a distance so corrupt Tweed as to chase the salmon from haunting therein; 2. Whether *de jure* a man might do, for his own profit, to the prejudice of his neighbour. ALLEGED, that the freedom of *dominium* was universally true in law, *dummodo non fecerit ut alteri noceat*, and that it be not done *ex animo malitioso* to the prejudice of his neighbour; and that the prejudice redounding to the public was but a cloak to cover the private gain of the tacksmen of these fishings.

REPLIES pursuer,—It is not denied but the nature of *dominium* is to dispose freely on their own: yet there were some exceptions therefrom, as 1*mo*. *Nemo debet locupletari cum alterius jactura;* 2*do*. *Expedit reipublicæ ne quis re sua male utatur, et ne alterum lædat:* and that a man might in *suo libere agere;* but where the action terminates *in alieno* he might not *libere agere*. That Haining might do with his water what he pleased; but to immit his water *in alieno*, to their great loss and prejudice, it was denied. For this were several laws both in C. and D. cited. Then they subsumed that Tweed, as to the salmon-fishing, was *alienum*, and not Haining's, and that though *usus* of the river of Tweed (being *flumen publicum*) was *communis* by the law; yet as to the salmon fishing, which is *inter regalia*, it was *juris privati*, which could not be prejudged by the pursuer's draining of the water of his loch; it being notourly known that it did contain not the pure water of Tweed. And where it was alleged, that it was not *noxa perpetua*, nor to be a lasting thing, but that Haining would complete the said draining with-

in half a year, being begun in January last; REPLIED,—That it was *noxa perpetua*, for salmon being once scared out of a river by stinking water, they would never return again. It was generally observed this year was a very barren year of salmon. Then ALLEGED,—Though a master be free to do with his own, yet that right did cede to the public in the case of famine, plague, or war, where self-preservation by the law of nature doth paramount all men's private property; but that a man may not on his ground use his own industry, even though it be to the prejudice of his neighbour, if principally he do not intend that maliciously; for that interdict, *ne quid in flumine publico*, is express in the law, *quo minus navigationi obsit:* but that he may not lead the water of his own land into the public river of Tweed, whose use is common, and which dimits in the sea which is the latrons and receptacle of the universe, is *inauditum*. And where it is ALLEGED,—That in Scotland a man may not big in his own land to the prejudice of his neighbour's mill; 1*mo*, it is denied; 2*do*, there is a vast difference betwixt a mill and a salmon fishing, as to public utility. Then, as for steeping of lint in lochs, which is forbidden, and so alleged to be *declaratoria juris communis* by the Act of Parliament; ANSWERED,—The Act of Parliament anent the steeping, &c. is only but for such a particular time. But both as to the bigging of mills, and steeping of lint, and our case, there is a vast difference; for by the law *non potest amitti quod non est acquisitum. L. 2 c. De acqui. rerum dominio.* Men cannot be said to be prejudged of that which they have not in their possession. But till salmon be taken, they cannot be said be prejudged who owe the fishing; because by the law *qui jactum retis emit spem emit;* and so it is most uncertain. Nor 2*do*. Is it possible to prove that Haining's loch scars the salmon or prejudges the tacksmen; because it falls not under sense; and none can give a reason why fish haunts or dishaunts, but he that knows the wonders of the deep.

Act. Nisbet. *Alt.* Sir Andrew Gilmour. *MS. folio* 50.

1661. *November* 17. SIR JOHN GIBSONE'S LADY *against* JAMES FLEEMING her Son.

THERE fell in a debate betwixt Sir John Gibsone's Lady, and Ja. Fleeming her son. The case was, Sir John's Lady paid to Patrick Scot L.100 Sterling, resting by Malcolme Fleeming her husband by bond, and did neither keep the bond uncancelled, nor yet take an assignation thereto. She being executrix to her said husband, and craving allowance of this in her summons of exoneration against her sons, to whom she was countable for her intromission; she alleged that, *officium nemini debet esse damnosum*, and that she truly paid that sum to Patrick Scot after her husband's decease, and produced a declaration under his hand to that effect. On the other hand it was contended, *quod non regulariter et jure fit, id dolo præsumitur factum esse;* she ought not to have paid it without a sentence, and she should have taken assignation thereto: but the bond being cancelled, *et apud debitorem repertum, inducit liberationem debiti.* The Lords found in the Inner-House, that she ought not to have allowance of it, in respect it was cancelled.

Act. Nisbet. *Alt.* Lockhart. *MS. folio* 51.

1661. *December* 4. WHITE *against* PATRICK CROCKAT.

WHITE, a Fletcher in Falkland, convenes Patrick Crockat in Alyth, libelling That he coming to his house to lodge with some other drivers, he had in his custody 600 merks, which he shewed and intimated to Patrick; who bound and obliged him by word to secure him while he was in his house, and promised to go betwixt him and all hazard. He libelled it was taken from him that night out under his bed by the said Patrick; at least he was seen often to come into the chamber in the night: and so, by the law, concluding restitution. The defender denied the libel. The question was anent the manner of probation.

It was found in the Inner-House that that part of the libel bearing the pursuer to have had money with him in a bag when he came to that house, [was] probable by witnesses; which if he proved, they would allow him *juramentum in litem* anent the quantity. For the other part anent the promise, they found it only probable *scripto vel juramento*, together with the intimation.

Act. Maxwell. *Alt.* Dinmuire. Jo. Hay, *C.*

MS. folio 51.

1661. *December* 6. ALLANE *against* MUIRE and GIBSONE.

MUIRE being addebted to ——— in L1000, a creditor of his, knowing that one Allane was owing to Muire 50 merks for the price of a horse, arrests that sum in his hand, and gets a sentence against him to make it furthcoming: Allane having past his promise to one Gibson, another creditor of Muire, before the arrestment; who recovers sentence against him upon his confession. They both contending for the sum, he to whom the promise was given before the arrestment was preferred to the arrester, and the debtor found only liable in single payment of the sum.

Act. Heriot. *Alt.* Eleis. Jo. Hay, *C.* *MS. folio* 51.

1661. *December* 20. DIRUR (DEWAR) *against* The Countess of MURRAY.

THE Countess of Murray having set a tack to Ja. Dirur (Dewar) for payment of 1200 merks, with a clause irritant, that in case it should happen two terms to run in the third unpaid, that then she should eject and remove him, and meddle with his corns and cattle, without any hazard of spulyie or ejection; and that *brevi manu*, without a declarator. The Countess having ejected him and meddled with his goods, she is convened for spulyie and ejection, having neither poinded his goods nor got declarator on the clause irritant. ALLEGED, *Quilibet potest renunciare juri pro se introducto; et prout unumquodque contrahitur, sic etiam dissolvitur.* That he had renounced the benefit of a declarator in the tack, and in the mutual

contract was content the lady should eject him without a declarator: and that *beneficium non confertur in invitum*; as, *et volenti non fit injuria.*

REPLIED,—that just as in clauses irritant for not payment of a feu-duty there is a necessity of a declarator, though dispensed with, even so here. ALLEGED, There was a disparity, because in clauses irritant that are provided by an express law of feus, there is necessity for a declarator by reason of their importance, tending to take away heritage: but in conventional clauses irritant, betwixt master and tenants, there is no necessity; but the master may *brevi manu* eject, it being so provided betwixt them, especially where there is no third party lesed by the ejection.

The Lords assoilyied from the ejection, in respect of the contract. It was also alleged that the Countess had accepted of a part of the tack-duty after the committing of the clause irritant; which they found she might do without prejudice of the ejection.

Act. Nisbet. *Alt.* Gilmour. *MS. folio* 51.

1662. *January* 1. BRAID *against* JO. BRAID.

ONE Braid pursuing a declarator of escheat on the crime of adultery committed by his brother, Jo. Braid; ALLEGED, No declarator because no escheat for adultery unless the party had been convicted of the crime before an assise in a Criminal Court: *ita est*, there is no doom produced against the defender, bearing him to be convicted; *igitur*, Reply not relevant, because, by the act of Parliament, any man that is found guilty of adultery, his escheat falls; but the defender has not only taken a remission, but has made his repentance before the kirk, and judicially confessed the same.

The Lords found neither his confession before the kirk, nor his repentance for that crime, was relevant in law to make his escheat fall; yea not his remission: and generally found no ecclesiastic confession of any crime relevant to infer any punishment in their body, far less in their estate; lest men, for fear either of their life or estate, should be hardened in their sin, and scared from confession. Which was well decided. *Referente Domino Stair.*

Act. Yeoman. *Alt.* Chalmers. *MS. folio* 51.

1662. *January* 1. Colonel LOUTHIAN *against* THOMAS FAIRHOLME.

COLONEL LOUTHIAN against Thomas Fairholme. Mr. Williamsone having drawn a bill on Fairholme to pay L.500 Sterling to Louthian, he did neither accept nor refuse it, but sent his man to him with 1000 merks, as he alleged, in lent money. Louthian, as if he had accepted the bill of exchange, gave him a discharge or receipt in part of payment of the money contained in the bill, which Fairholme's servant brought to him from the Colonel; yet since declares he had

no warrant from his master to take it. Fairholme, on the sight of this receipt bids him quickly return it to the Colonel, and take another receipt, as of borrowed money, which the Colonel refused. When this came to be debated, it was found to be an acceptance of the bill, and Fairholme was decerned to pay the whole sum, because of the exuberant faith in bills of exchange.

Act. Sinclair. *Alt.* Maxwell. *MS. folio* 51.

1662 *November* 12. Lord BURGHLIE *against* LAFODDIE in Fyffe.

IN a case betwixt thir parties, found that a base charter of kirk-lands clad with possession, but not confirmed till long after the possession, is preferable to a public infeftment confirmed before; and that in respect the base infeftment was clad with possession long before the other's confirmation, and that but interruption: and that the subsequent confirmation of the base right, though posterior to the other's public confirmation, was drawn back to the date of the base seasine clad with possession, as said is.

Act. Cunyghame. *Alt.* Nisbet. *MS. folio* 51.

1662. *November* 15. THOMAS NICOLSONE *against* GEORGE BALFOUR of Balbirnie.

MUTUAL molestations being pursued by Mr. Thomas Nicolsone and George Balfour of Balbirinie of either of their possessions of the Mure of Bigtie, adjoining to both their lands: Mr. Thomas being infeft in Pittenthas *cum pastura et libero introitu et exitu;* the other being infeft in Markincsh *cum communi pastura in mora de* Bughtie:

The Lords found Mr. Thomas his infeftment, with forty years possession in the said mure by pasturing, relevant; but because Balbirnie alleged he was *per expressum* infeft in that mure, and had interrupted Mr. Thomas *via facti* from pasturing, &c. therefore they ordained Mr. Thomas to prove forty years possession before the alleged time of Balbirnie's interruption: and they inclined that if Balbirnie had raised a declarator of property, or right on his infeftment, he might have debarred Mr. Thomas. But the judgment being possessory, they sustained Mr. Thomas his interest *cum communi pastura*, he proving *ut supra*.

Act. Nisbet and Balfour. *MS. folio* 51.

1662. *November* 15. BURNET *against* ———.

IN this case, found that an executor pursuing for a debt owing to the defunct testator, who was neither merchant, venturer, nor factor: and the debtor alleging

that, by the testator's own count-book, the debt is paid him in his lifetime, which is equivalent to a discharge;

REPLIED,—That though in other cases, *privata scriptura facit fidem contra scribentem*, yet to force the executor to produce the testator's count-book, to take away a debt constituted by writ, were hard, he never being factor, merchant, &c.; for the case was put as, if the testator had left a discharge subscribed, beside himself, undelivered, can any in reason thereon think the debt is discharged? Notwithstanding whereof it was found that, by the testator's count-book, the debt was discharged, though the bond was not retired.

Act. Nisbet. *Alt.* Lockhart. *MS. folio* 51.

1662. *December* 3. LADY EDNEM, *against* ———.

IN this case found, that a pension is not a real right, so as to tie a singular successor in payment thereof.

Act. Lockhart. *MS. folio* 52.

1662. *December* 3. SINCLAR *against* SPOTISWOOD.

THE case was, Peirsone having wadset his lands to Hamilton; and finding that the wadset-granter was inhibited before his right, by a lawful creditor; he transacts with the said creditor, and takes assignation to the bond, and haill diligences raised thereon; and then charges Duncan, who is cautioner for the debtor in the bond, to pay the debt: who, suspending that he was willing to pay the debt, the assignee giving him a right to the bond, and haill diligences used thereon, for his relief against the principal;

ANSWER,—He could not assign him to the inhibition, because it might then affect his own right of wadset made to him thereafter.

The Lords found he behoved to assign, or else to discharge the cautioner of the debt; and that the charger had a design to cheat the suspender of his right.

Act. Spotswood. *Alt.* Sinclar. *MS. folio* 52.

1662. *December* 3. ——— *against* ———

FOUND, in a case betwixt two donators, that the first expede gift, with the first summons, raised, executed, and called, ought to have the preference of the other, though they were both ready to debate on one day.

Dinmuire. Stewart. *MS. folio* 52.

1663. *January* 20. PATRICK NICOLL *against* SIR ALEXANDER HOPE.

IN a molestation pursued by Patrick Nicoll against Sir Alexander Hope, wherein he craved that he might demolish a dike bigged by Sir Alexander upon his property; EXCEPTED, Grant it were bigged on your property, yet I offer me to prove, that by a condescendence betwixt your authors and me, it was agreed, the dike should be the march betwixt us, both having lands of Granton; by virtue whereof, that dike has stood as march betwixt [us] these 20 years past, till now.

ALLEGED, He behoved to condescend on the manner of probation of this agreement. He offered to prove it by witnesses; as being enough, after so long possession. URGED, Such a verbal condescendence betwixt the pursuer's author and this defender is not sufficient in law to take away any one's heritage, without writ; the pursuer standing infeft in the lands of Granton, specially condescended on and bounded in his infeftments. Then contended, a verbal condescendence on a dike to be the march betwixt the two Grantons, clad with 20 years possession but interruption, was probable *prout de jure*. The Lords found that condescendence not probable by witnesses, but only writ, unless it were alleged that the ground whereon the dike is bigged was contraverted before by the heritors of the two Grantons.

Act. Cunyghame. *Alt.* Harper. *MS. folio* 52.

1663. *January* 24. ——— *against* ———.

A SUM of money being resting by A to B, B assigns to C; and the creditor B being owing a like sum to D, the same is assigned by D to A. C the assignee, charging A to pay the sum assigned to him by B, A propones an exception of compensation of the like sum owing by B, his cedent, to D, and assigned by D to him, before the assignation made by B to the charger; which, being so prior to the pursuer's right, must compense the assignee as well as the cedent.

ANSWERED,—*Non relevat* to say the assignation was prior, unless he also say the same was intimated to my cedent before my assignation. This the Lords found relevant, and repelled the exception of compensation foresaid. This interlocutor was stopped by a bill, on very good reason.

Act. Wallace. *Alt.* Lockhart. *MS. folio* 52.

1663. *January* 25. ——— *against* ———.

A WOMAN being convened to pay a debt, conform to a bond granted by her and her husband; EXCEPTED, The bond is null *quoad eam*, being then clad with a husband.

REPLY,—She had thereafter ratified the bond and debt judicially, *extra præsentiam mariti*, and so could not quarrel the same.

DUPLIED,—The ratification could operate nothing against her, being *super actu ex se illicito*, and intrinsically null; a woman clad with a husband not being a person who could contract debt. This was desired to be heard *in præsentia*.

MS. folio 52.

1663. *January* 25. THOMAS BEG *against* SIR THOMAS NICOLSONE.

THOMAS BEG, pursuing Sir Thomas Nicolsone of Carnock to pay the sum of contained in his bond to Thomas Beg and Janet Levinston, in conjunct fee, and to the bairns to be gotten of the marriage, in fee; which failyieing, to Thomas and Margaret Begs, bairns of a former marriage; on which bond infeftment follows:

ALLEGED,—This sum cannot be paid to Thomas, because the fee of the sum failyieing of bairns of this marriage, did terminate in his other bairns *nominatim*, whereon infeftment followed; and there behoved to be a renunciation of the infeftment by Beg's bairns, before he could pay the sum *tuto*.

The Lords found the fee of the sum, failyieing of bairns of the marriage, belonged to the father; and that the bairns named in the bond could have no right to it, without they were served heirs of provision to their father; and found their father's discharge sufficient, without renunciation.

Act. Chalmers. *Alt.* Norvell. *MS. folio* 52.

1663. *January* 30. The BURGH of LINLITHGOW *against* ANDREW BENNET.

THE burgh of Linlithgow, having found Andrew Bennet, inhabitant in Borrowstounenesse, within their town, imprisons him, fines him, and takes a bond of him, not to traffic with staple goods; and thereafter charging him to pay the failyie contained in the bond; he suspends, that the bond was extorted from him, and so null, there being no law nor practick warranting burghs royal to take this way to vindicate their own privileges against burghs of barony. CONTENDED, Burgesses of burghs royal, as they had the privileges to arrest any man to find caution *judicio sisti*, &c. for debt owing to themselves, so they had the like privilege to attach men for their own liberties.

The Lords found the reason of suspension relevant, and assigned a day to prove; and so found the way Lithgow had taken not warranted by any Act of Parliament.

Act. Nisbet. *MS. folio* 52.

1663. *July* 1. THOMAS OGILVIE of Trotock, *against* THOMAS BROWN.

THOMAS BROWN, by contract, is bound to give in tocher with his sister, L.1000 to Thomas Ogilvie of Trotock, and he is bound to add another L.1000; which haill sum is provided to the man and woman in liferent, and the heirs of the marriage; which failyieing, the one-half to return to the wife's heirs, and the other to the man's. The wife dying, leaves a bairn, which was never served heir, and thereafter dies. The husband convenes Thomas to pay the sum convened in tocher. ALLEGED, The existence of a bairn, though not served heir, purged the condition of the tailyie; and that *potentia succedendi* was respected in law, and not *actus;* and that *in personalibus* there could be no tailyie. Yet the Lords found the sum tailyied, which was not nullified by the existence of a bairn, he not being served; and that it returned to the wife's heirs; whereas, if the contract had been, in case there were no heirs, it had altered the case. Yet the decision was very hard.

Act. Dunmuire and Lockhart. *Alt.* Wallace. *MS. folio* 52.

1663. *July* 1.

THE business of the recognition pursued by my Lady Carnegie against my Lord Cranburne; and the other action of declarator, at my Lord Stormond's instance, against the Earl of Annandale and his creditors; with the dispute betwixt the burghs royal and of barony; are to be had in the Informations thereof.

6 *ADVOCATES' MS. folio* 52.

I PROCURED, from MR. WILLIAM LAUDER, Clerk, a Civil Register of Decreets, beginning the 1st of November, 1663, and ending the 22d, inclusive, of January, 1664; so that, in some measure, it comprehends what Decreets were done by the Lords, and extracted, the space of three months of a Winter Session, in that Chamber.

Edinburgh, 6th November, 1663, Sederunt Domini Sessionis; Craigmillar, *Præses;* Clericus Registri, Clericus Justiciariæ, Halkerton, Lea, Carden, Colinton, Strathhurd, Kinglassie, Reeddie, Arniston.

Signet MS. folio 1.

1663. *November* 6. BESSIE OSWALD, *against* SIR HENRY BRUCE of Clackmannan.

SIR HENRY BRUCE of Clackmannan, with his brother, James Lord Rollo, designed in the bond *Laird of Duncrub*, and George Auchinleck of Balmanno, by their bond, of the date 1640, grant them to have borrowed 9000 merks from Mr. Andrew Oswald, Adv. which they bind and oblige them thankfully to repay. In anno 1656, Mr. Andrew marries his daughter, Bessie Oswald, to Jo. Rollo of Woodsyde; and, in name of tocher, assigns her husband to this bond. The said Jo. coming to die; *in anno* 1661, makes his latter will; wherein he nominates his wife his sole executrix and intromissatrix with all his goods and gear. In his testament this bond is given up amongst his other debts. In 1662, she confirms the testament before the Commissary of Stirling; and then, as executrix nominated and confirmed, she pursues upon the said bond; and declares that, *hac instantia*, or *pro loco et tempore*, she passes from all the remanent defenders, except only Clackmannan himself: against whom she craves decreet may be given *secundum allegata et probata*, because she produces instantly, in presence of the Lords, the extract of the said bond out of the register; *item*, her contract of marriage, wherein is the assignation to the said bond; *item*, her husband's testament testamentar, duly confirmed. All which rights, reasons, and allegeances, being seen and considered by the Lords, [were] found relevant, and so admitted to her probation. Which she clearly verifying, by production of the forementioned writs; the defender also not compearing to allege any reasonable cause in the contrary; the Lords decerned him to make payment to the said Bessie, as having good right to the same, by being executrix confirmed to her husband, who was assignee thereto.

Aot. Norvell. No compearance for the defenders; and so a decreet in absence.

Hay.

Signet MS. No. 1. *folio* 1.

1663. *November* 6. ANDREW HAMILTON of Overton *against* GEILLS HAMILTON and AGNES BROWN.

GEILLS HAMILTON, daughter lawful to Archibald Hamilton, with her mother, Agnes Brown, and Mr. Alexander Gibsone, one of the clerks of his Majesty's Session, intents a summons of exhibition, *ad deliberandum tantum*, against Andrew Hamilton of Overton; particularly of a seasine of the lands of Standlawsyde, within the sheriffdom of Lanerk, and barony of Evendale, in favours of the said Archibald, her father, his heirs and successors. This charge he having suspended, upon this reason,—that what writs he had of the pursuer's, he was willing to exhibit them; but for that seasine, he had it not, because he offered him to prove, that seven years since he gave furth that seasine, to defend in an action against William Simpsone, to the said Geills her behoof, and could never get the same back again. Notwithstanding of this reason, decreet of suspension is given out against him; and, upon the decreet, he is charged with letters of horning, to obey the contents thereof. Upon this he gives in a supplication to the Lords, shewing, That whereas he has now, with much trouble and expense, recovered the said instrument of seasine, he is most willing to exhibit the same to the pursuers; and craves the Lords may call Mr. Alexander Gibsone before them *in præsentia*, and ordain him to pass from his decreet and letters of horning, and to accept of the seasine now. Which desire of the bill, (of consent of parties,) the Lords ordained to be satisfied.

For the Supplicant, Oliphant. *Alt.* Mr. Rodger Hog.

Signet MS. No. 2. folio 1.

1663. *November* 6. ALEXANDER LESLIE and the KING'S ADVOCATE *against* WILLIAM ROBERTSON of Inches.

JO. ROBERTSONE of Inches, within the sheriffdom of Invernesse, dies. Mr. William Robertsone, his son, succeeds him. But because the lands held ward of the King, the ward, the right of non-entries, the avail of the marriage, with the relief of the lands, fall all in the King's hands as superior, and so are at his gift and disposition. Alexander Leslie, Writer to the King his Majesty's signet, gets the gift thereof, *in anno* 1661. Whereupon, as donator, with concourse of the King's advocate, (Sir Jo. Fletcher of Newcranston,) he intents action of declarator of his gift of the ward and non-entries, &c. wherein he summons the said Mr. William, and all and others having interest, to compear before, &c. to hear and see it found and declared that these lands wherein his father died last vest and seased as of fee, holden of our Sovereign Lord, were in his Majesty's hand as superior thereto, by reason of ward and non-entries; and that the King by his gift produced, has constituted him his donator thereto; and, therefore, that he has only undoubted right to crave to be obeyed and answered as to the mails, farms, canes, customs, duties, and casualties of the said lands, conform to the tenor of

his gift. Upon sight of the gift, the defender not compearing to allege any thing in the contrary, the Lords gave furth decreet conform to the desire of the summons. *For the King's advocate,* compears Norvell; *for Leslie,* James Abernethie. Hay.

Signet MS. No. 3. *folio* 1.

1663. *November* 18. Jo. KNOX *against* The EARL of Roxburgh.

ROBERT, Earl of Roxburgh, by his bond dated 1635, binds him and his heirs to content and pay (for causes specified in the bond,) yearly a pension of 100 merks to Mr. Jo. Knocks, Minister at Boudon, and Agnes Borthwick his wife, during all the years of his lifetime, yearly at Yule. My Lord Roxburgh lives till 1650. All this while, not a farthing of it is paid. William, now Earl of Roxburgh, oy and heir of tailyie and provision, serves and retours himself heir to the deceased Robert, his grandfather. In whose time nothing of the pension is paid either. In the meanwhile, Mr. Jo. to whom the pension was due, dies, *in anno* 1656. His son, Mr. Jo. Knox, late Minister at Leith, confirms his father's testament, and gets himself made executor dative to him; whereon he charges this Earl of Roxburgh for to make payment to him of the said sum of 100 merks yearly, for twenty years, which made 2000 merks; *item,* for 10 pounds of failyie that was in the bond, and that for every year. For instructing his title, he produces, first, the bond of pension; then his father's testament, confirmed before the Commissary of Roxburgh; then a seasine conform to a precept out of the Chancellary, extracted out of the registers, whereby the now Earl infefts himself as heir to his grandsire. Which the Lords held for a sufficient and relevant probation; and, therefore, gave furth decreet, ordaining William, Earl of Roxburgh, *nomine quo supra,* to make payment of the said 2000 merks to the pursuer.

Act. Mr. John Colvill.—It's a decreet in absence. Kello.

Signet MS. No. 4. *folio* 4.

1663. *November* 18. GORDON of Lesmoir *against* GORDON of Clunie and GORDON of Craig.

SIR ALEXANDER GORDON of Clunie, James Gordon of Lesmoir, and Jo. Gordon, fiar of Craig, at Invernes, 1626; bind and oblige them in behalf of George Lord Gordon, and for relief of part of his debts, to content and pay to William Dick, merchant in Edinburgh, afterwards Sir, &c. the sum of 14,000 merks. The bond has a clause of relief among themselves. Clunie warrants for L.4000; Lesmoir for 5000 merks, and Craig for 2000 merks. Clunie receives infeftment, for his security, of lands in Scurdarg, Newseat, and Strathbogie; which, because they were liferented by the Marquis of Huntlie, therefore during his lifetime, my Lord Gordon gives him infeftment of the 15 merk land of Susgarrow, in Lochaber, to be intromitted with by him in contentation of the annualrent of his money. *Item,*

out of the mails and duties of thir lands, Clunie binds him to content and pay yearly to Lesmoir the sum of L.400, as the annualrent of that part of the principal sum warranted by him; and that so long as Clunie should bruik and possess the said wadset lands, by uplifting the mails and duties thereof. *Item*, because immediately upon the decease of the Marquis, Clunie was to enter to the possession of the lands of Scurdarg, Smythston, and others now liferented by the Marquis: Lesmoir obliges him, upon the Marquis his decease, to pay to Clunie L.4000, Clunie then resigning over to him his right he will have to the said lands. With many other mutual clauses and obligements therein. Sir William Dick, *in anno* 1629, sues for payment at Lesmoir; obtains 7000 merks in part of payment of 14,000 merks; whereon he gives him an acquittance *(discharge,)* containing an ample assignation for his relief and warrandice of the rest. This Lesmoir's son is charged in February last, 1663, at the instance of one Hierom Spence, of Brunston, to enter heir to his father within 40 days, conform to the Act of Parliament. He renounces to be heir to his father: whereupon the said Hierom obtains against Lesmoir's estate a decreet of adjudication; and so amongst his other rights and securities purchases that right also he had to charge his *correi debendi*, upon that contract, for relieving and warranting him conform thereto. At last the said Hierom assigns and makes over to Lesmoir (who was the very man he had charged, and upon his charge had renounced,) his decreet of adjudication. Whereupon as assignee constituted he intents this action, and charges the heirs, as well male, line, tailyie, as of provision, both of Clunie and Craig, to make payment to him conform to the said contract passed betwixt their fathers *in anno* 1626. For instructing of all which to the Lords, was produced,—first, That contract or principal appointment; then Sir W. Dick's discharge, bearing an assignation; then that decreet of adjudication, with the assignation thereof made to the pursuer; then the charges he gave Clunie and Craig their heirs, to enter heirs to their fathers, with the executions thereof. In respect, whereof, the Lords decerned the defenders to make payment of their respective parts as shall be divided.

Act. Patrick Fraser.—It's a decreet in absence. *Signet MS. No.* 5, *folio* 1.

1663. *November* 20. ABERCROMBIE *against* THOMAS RONALD of Woodhill and OTHERS.

THOMAS RONALD of Woodhill, sets in tack and assedation, *in anno* 1657, for 3 or 5 years to come, at the tacksman's option, to Alexander Hewat, the equal half of the lands of Ladinghame's and Gavine's crofts of Blackhall, lying within the parish of Inverurie, and sheriffdom of Aberdein; for payment to be made to him of some 40 merks of tack duty, with some other small casualties. Ronald, *in anno* 1662, obtains decreet before the sheriff of Aberdein against Hewat, to make payment to him of the said tack-duty that these 2 years bygone was resting owing unpaid; and, thereupon, gets a precept to Ja. Panton, sheriff-officer, to poind, apprise, and distrenyie his (Hewat's) readiest goods and gear that he had on the crofts of Blackhall. Which the messenger coming to do, the said Hewat produced his

master's discharge for the duty of the said lands, 1659, and all years preceding since his entry: and desired that the messenger would not poind his whole goods; but for that only which was truly resting, and was contained in the said decreet. Which, when the Master's depute was willing to do, Ronald ordained him to proceed in his poinding of the whole, notwithstanding the said discharge, and that he should warrant him; which he accordingly did: and so finding upon the ground of the said lands, 4 oxen, 4 kye, with 3 followers; a 2 year old steir, and a quoyack; he poinded the same, having admitted two burgesses of Inverurie, who, upon oath, apprised ilk ox to L.10, ilk cow to L.8, ilk one of their followers to 10 merks, the quoack and steir to L.8 the piece: offered them to any that would pay the sums contained in the decreet. Hewat takes instruments on all this. Then they carried them to the market cross of Aberdeen, and there apprised them to 194 merks money. Where compeared Hewat's son in name of his father, and protested against the apprising of the foresaid cattle; in respect it was in bear-seed time, and some of them were plough goods; *item*, because they had poinded more than they know would satisfy the debt; and, therefore, protested for spulyie, and all damage and interest that might follow: upon which he took instruments in a notary's hand. Hewat makes and constitutes Alexander Abercrombie of Fetterneir his assignee to the right he had to pursue the said action of spulyie, and to call for redelivery of the said goods; who immediately intents summons of spulyie, and violent profits against Ronald of Woodhill, Panton the officer, and others, their accomplices; warning and charging them to compear, &c. to hear themselves decerned to have done wrong in the said wrongous, violent, and masterful spoliation of the said cattle, being 13 piece in all, pertaining to his cedent; because in his possession, because on the ground of the lands possessed by him, because they stood and fed in his byres, laboured and tilled to his utility, at his pleasure, for certain space before the spoliation. *Item*, The beasts, their age, colour, horns, are all described; *item*, What each of them was worth; *item*, What profit Alexander Hewat, his cedent, might have made of the said beasts daily, if they had not been, in manner aforesaid, violently reft from him, and detained till now. And, therefore, he craves they may be decerned either to restore and re-deliver them to him in as good case as they were, the time of the spoliation; or else to pay the prices thereof libelled, together with the said daily profits libelled, which his cedent might have had. For instructing the which libel, the pursuer produced the assignation made to him by the said Hewat, of the said kye and oxen, &c. dated 1662; then the assedation and tacks granted in 1657 by Ronald to Hewat; then Ronald's discharge of 1659, and all terms preceding; then the transumpt of the executions of the poinding, under the said Panton's subscription manual; then his (Hewat's) instruments he took in [the] notary's hands, protesting against the illegality of their poinding.

Compear the defenders by their procurator; and for them he produces the instrument taken upon the apprising, and the offer made of the said cattle to the said Hewat, or any in his name that would accept the same, for the prices at the which they were apprised; *item*, A note of the executions of the poinding, bearing the persons' names (nine in number) that apprised, and their prices, &c. with letters of incident diligence against the said Panton, for making him exhibit the said principal executions. All which, the Lords having well con-

sidered, they assoilyie the defenders from spulyie as to the four kye and the quoyack, because they find them to have been orderly poinded: *item*, Decern them to have done wrong,—yea, to have committed spulyie in their pretended poinding of the four oxen, the three followers, and the steir; and, therefore, ordain them to re-deliver the same to this pursuer as assignee, or else to content and pay to him L.18, as the price of each of the said oxen and steir, modified by the Lords; *item*, L.40 for violent or excrescent profits of the same: yet assoilyie from any violent profits of the three followers or steir, because they have none, &c.; and ordain letters of horning to pass upon the premises on fifteen days; because they found the alleged poinding thereof to be a direct spulyie. And this, notwithstanding, that, the time of litiscontestation, it was alleged by the defenders that they ought to be assoilyied from the said spulyie, because they poinded the foresaid goods alleged spulyied, by virtue of a lawful sentence for a debt truly resting: for this having been found relevant, and so admitted to their probation, and a day assigned to that effect; whereon their procurator protested for an incident, and the pursuer's procurators in the contrary; the day being come, he succumbed in his probation for them, and the Lords found the exception of lawful poinding proponed by the defenders, proven allenarly as to the five kye; and, therefore, as to the oxen, &c. gave furth their decreet, *ut supra*.

Act. Mr. George Nicolson, Mr. Alexander Seaton. *Alt.* Mr. David Thoirs.

Signet MS. No. 6, *folio* 2.

1663. *November* 21. THOMAS HEPBURNE *against* JO. KER, MATTHEW ROWAN, and OTHERS.

ROBERT HEPBURNE, merchant-burgess in Glasgow, had, the time of his decease, sundry tenements of lands lying within the said burgh pertaining to him. He dies. Thomas Hepburne, in Craigmuire, his brother's son, as apparent heir, intents a summons of exhibition of whatsoever writs, rights, evidents, contracts, dispositions, charters, infeftments, precepts of seasine, heritable bonds, and other securities, granted to his said uncle or his authors, of the said lands and tenements, or his other rights whatsoever, that he may have inspection thereof, *ad deliberandum* whether he should enter heir or not to his said uncle; *item*, for delivery of the same to him as his own proper writs and evidents, to be used by him at his pleasure, if he find upon inspection thereof that it will be profitable to him to serve and retour himself heir to his uncle; and these unrased, uncancelled, &c. against Jo. Ker, Matthew Rowan, writer in Glasgow, and others, as havers, one or other of them in their hands, keeping, and custody, the said writs and evidents after called for, (which must be specially designed,) or, at the least, had them, and have now fraudfully put the same away. Their having thereof, he refers to their oath of verity; whereupon their procurator takes a day to produce them to give their oaths; which, the day being come, he accordingly did. And they upon their oath being examined anent the points of the summons, the Lords found their depositions not to prove the said summons libelled against them. Whereupon by decreet absolvitor, the Lords assoilyie them *simpliciter* from the articles of the summons,

and desire of the pursuer, craving them to bring with them the said writs called for, and then to hear themselves decerned to exhibit or deliver the same to him.

Act. Sir Thomas Wallace. *Alt.* William Braidie. Hay. J. Boog.

Signet MS. No. 7, folio 3.

1663. *November* 25. GEORGE LEITH of Threefield, and OTHERS, *against* GEORGE DUMBAR of Elsleisk.

JO. DUMBAR of Moynes, and his son, by their bond, constitute themselves debtors to George Dumbar of Elsleisk, for causes therein contained, in the sum of 18,000 merks. Elsleisk understanding that there was as much addebted to Moynes, his debtor, by George Leith of Threefield, Erskin of Pittodrie, &c. he arrests in their hands; and then pursues them, the debtors, also for their interest, to make arrested goods furthcoming: so that he obtains decreet against them, *in anno* 1662, ordaining them to make payment to him of the said sum, wherein they were addebted to Dumbar of Moynes. Of this decreet, George Leith of Threefield, with the others decerned, raises a reduction; charging Dumbar of Elsleisk, the clerk of register, and his deputes, to exhibit and produce the said pretended decreet, with the letters of horning, inhibition, arrestment, comprising, or others, if any were raised upon it, with their executions; with all the haill warrants and grounds of the said decreet; to hear and see the same reduced: 1*mo*, Because the same was given for null defence, and not compearance, they never having been warned personally thereto, by a messenger-at-arms, as behoved to be in all actions for making arrested goods furthcoming; neither was it ever publicly called, for it was put up only in the minute-book. *Dumbar of Elsleisk* contra *Dumbar of Moynes.* Patrick Fraser, upon suspicion, compears and gets it scored; and the summons being sent to him, and he finding nothing in it (as he suspected) against Leith of Threefield, or Pittodrie, (who are now pursuers,) he passes from it. In the mean time, a decreet for not reproduction, is put upon the minute-book, thus only—*Dumbar of Askleisk* against *Dumbar of Moynes;* whereas, when it is called, they most surreptitiously take out decreet against thir pursuers, who, according to the common order and practique, were *in tuto* not to compear: the actors, therefore, of such fraud, should be condignly punished, otherwise the lieges cannot be in security. 2*do*, If they had been summoned, (as they were not,) then they would have alleged, as they do now, that no such decreet could be given out against them; because, long before Elsleisk's arrestment made in their hands, they had paid the money they were owing to Moynes to Thomas Forbes of Auchortes, who had recovered decreet against them to that effect, as his discharge produced by them attests; and so cannot be holden in double payment. 3*tio*, No decreet could be given against Pittodrie, nor Bracco, because there was never arrestment made in their hands, neither were they ever addebted to Moynes in any sums of money. But if there was any debt resting, or any arrestment made, then it was in their predecessors' times, who deceased long before this pretended decreet; and some person should have been summoned to represent them, which was not done:

but albeit it had been done, yet they could not have been holden to have given their oaths upon any arrestment made in their predecessors' hands; that being *factum alienum*, and not consisting in their knowledge. 4*to*, The said decreet is null, because the said Dumbar of Moynes, who became debtor to Elsleisk, being dead, there is no right established in the person of his heir or representative, by obtaining decreet of transferring against him; till which were done, no action nor decreet for making arrested goods furthcoming, could be sustained. And, therefore, the pursuers crave to be reponed *in integrum* thereagainst, *cum omni causa*, sicklike as if the same had never been pronounced. For instructing of all which, the pursuers produce the extract of the said pretended decreet which they crave to be reduced.

And the Lords, finding the desire of the summons relevant, ordain the defender's procurators to produce the writs called for; with certification that, if they failyie, the Lords will reduce the writs, and restore the pursuers thereagainst: and, for satisfying the production, assign them two several terms, whereupon two several acts lying in process were extracted. Both which terms being come, and the production not yet made,—the Lords, because of the said not production, reduced the whole writs called for, except the said decreet produced by the pursuers allenarly, in manner above written.

Act. Pat. Fraser. *Alt.* James Abernethie.

Signet MS. No. 8. *folio* 3.

1663. *November* 26. ANDREW DAW and ROBERT WOOD *against* HENRY HOPE, EUPHAME MONYPENNIE, JOHN SMITH, and OTHERS.

ANDREW DAW, in Craill, *in anno* 1650, is infeft upon disposition made to him by Sir James Lermonth of Balcomie, Knight, in the just two part of the lands of Sauchop, lying within the Sheriffdom of Fife; with the just and equal two part of the mansion or manor-place thereof, houses, biggings, yards, salt-pans, &c. lying within the parish of Craill. Upon disposition granted by the same Sir James, at the same time, Robert Wood, burgess, also in Craill, is duly and lawfully infeft in the just third part of the said lands of Sauchop, with the just third part, &c. After this, Sir James grants a bond to Mr. James Monypennie, sometime of Dummo, wherein he obliges him and his heirs to infeft the said Mr. James and his heirs, in an annualrent of 720 merks, to be uplifted by them out of the said lands of Sauchop; whereupon they are accordingly infeft; and upon their infeftment crave to get a decreet for poinding of the ground. To stop this, Andrew Daw and Robert Wood raise a summons of reduction and declarator against Henry Hope, as assignee constituted by James Monypennie, soh to Mr. James, to whom the bond was granted; *item*, Euphame Monypennie, and her husband, Mr. John Smith, minister in Edinburgh, and the rest of her brothers and sisters; before the commissioners for administration of justice: charging them to produce and exhibit the said contract, bond, or disposition, granted by Sir James to their fathers, with all infeftments, charters, &c. that have followed thereupon; *item*, to exhibit all rights, title, or securities of the said lands, granted by

King Charles I. or II. in their favours, or of any of their predecessors to whom they may succeed *jure sanguinis;* to hear them reduced, &c. and to hear decreet given, that the said pursuers have the only good and undoubted right of property of the said lands, pure and free, without any burden of annualrents, or yearly duties or servitude, especially of this infeftment of annualrent craved to be reduced; and so that they have good right, by intenting this action, to remove all impediments that may stop them in the peaceable possession of the said lands; *item*, that the said lands cannot be poinded by virtue of the said pretended infeftment.

The government changing, this action, by a summons of wakening, is of new, again, in 1663, intented; and therein, for verification of it, their seasines are produced. Two terms being assigned to the defenders' procurator, for satisfying the production called for in the summons, he failyies: whereupon the term is circumduced against him; and decreet pronounced, reducing the said writs, for not production.

Act. Mr. William Beaton. *Alt.* Mr. John Harper.

Signet MS. No. 9. *folio* 3.

1663. *November* 26. DAVID DICK, *against* The Tenants of LORD KIRKCUBRIGHT, and of ROBERT MAXWELL of Orchartoune.

DAVID DICK, writer in Edinburgh, for divers sums of moneys addebted to him by Jo. Lord Kirkcudbright, and Robert Maxwell of Orchartoune, *in anno* 1653, comprises both their lands, all lying within the stewartry of Kirkcubright, and Sheriffdoms of Dumfries and Wigton. *In anno* 1654, he obtained himself duly infeft in the said lands; whereupon, as having good and undoubted right to pursue this action, he raises a summons of maills and duties; charging them to pay to him their farms 1660, 1661, 1662; each of them at the rate of six chalders of victual, two chalders bear, two meal, and two oats, of the met and measure of Nithisdale, at twenty pounds the pound; and 600 merks of silver duty. The Lords finding the summons relevant, by reason of his seasine of the said lands, produced, grant a term to the defenders' procurators to produce them, to give their oaths anent the quantities libelled; which they failyieing to do, the Lords held them *pro confessis*, and gave furth decreet, conform to the desire of the summons.

Act. William Yeaman. *Alt.* Mr. Jo. Cunyghame. D. Dick.

Signet MS. No. 10. *folio* 4.

1663. *November* 27. JAMES FRASER, *against* ALEXANDER MACKENZIE of Suddie.

KENNETH MACKENZIE of Gilliechrist, *in anno* 1612, in one bond, grants him to have received 500 merks; in another, L.400, from James Fraser, burgess in

Inverness. He dies; whereon James Fraser, his oy, and as heir and executor dative decerned and confirmed to him, charges Alexander Mackenzie of Suddie, son to Kenneth, for paying these his father's debts, as heir to his father; and obtains decreet against him before the commissioners, *in anno* 1658; whereon he raises letters of horning and caption, and incarcerates Suddie in the prison of Invernes. The decreet, with all that followed thereupon, he suspends: 1*mo*, Because surreptitious, being for null defence, and not compearance, he never having been made warned thereto; and if any execution, bearing him to have been lawfully warned, be produced, he offers him civilly and lawfully to improve the same, *per testes insertos, et omni alio modo quo de jure.* 2*do*, If he had been warned, as he was not, then he would have alleged, as he does now, that no action could be sustained upon the said bonds, because prescribed, not being followed within forty years, conform to the 28th Act of the 5th Parl., the 54th Act of the 7th Parl. of King James the III. 3*tio*, As to the bond bearing 500 merks, the charge was most malicious, seeing the said bond was satisfied by his father; as appears by the discharge thereof, granted to him by the pursuer's goodsire. 4*to*, The said decreet is given upon a false ground, supposing him to be heir served or retoured to his father, which he never was; neither can any of the passive titles be inferred (as the summons concludes none,) against him; yea, he is even ready to purge himself, and to renounce, *re integra*, all benefit might accrue to him by being heir to his father, in favours of the charger. Which exceptions, as they would have been relevant *in prima instantia*, to stop the obtaining of that decreet, so now being proposed *in secunda instantia*, must be relevant to elide the same; especially considering, that on the change of the government, he has a summons of review depending at his instance, for revising the said decreet, conform to an Act of Sederunt of the Lords; as also process of reduction thereof. As to his being denounced to the horn, the truth is, he was stolen thereto; they executing the charge at Cessock, one of his houses indeed, but not his place of residence; and so knew nothing of it till he was incarcerated. Then he summons James Fraser, charger, to compear before the Lords of Council and Session, and to bring with him the said decreet, proceeding on a null and prescribed bond, without any lawful citation; to hear and see it, and all that has followed thereon, suspended *simpliciter*. The day being come, the charger's procurators are content to hold the copy of the suspension delivered to them for the principal: and to his reasons of suspension, they opposed, *first*, the decreet called for, ordaining him to make payment of the said sum of L.400 to the charger; then, for instructing his own title to pursue, he produced his goodsire's testament, wherein he is confirmed executor dative; then, for proving the suspender to be heir to his father, who was the *debitor contractor*, produces a minute of seasine under the subscription of William Lauder, notary thereto, *in anno* 1636, conform to a precept of the Earl of Seaforth to that effect, whereby this suspender is infeft in the lands and others pertaining to his father, as heir to him. This minute is under the hand of Thomas Williamsone, keeper of the registers and minute books within the Sheriffdom of Invernes.

Which answers to the forementioned reasons of suspension being well and ripely considered by the Lords, they found the letters orderly proceeded, and ordained the suspender to pay to the charger the said sum of L.400; assoilyie him from the bond of 500 merks, because of his discharge produced; decern him

finally to pay to the charger L.50, for expences, as modified by them, and really debursed by the charger, in obtaining his decreet and defending.

For the suspender, Act. Mr. George Norvell and Sir George M'Kenzie. *Alt.* Sir George Lockart, and Mr. Robert Trotter.

Signet MS. No. 11. *folio* 4.

1663. *November* 28. CORNELIUS CRAWFURD of Jordanhill, *against* M'CAILZONE and OTHERS.

MR. NINIAN CAMPBELL, minister at Roseneth, *in anno* 1656, by his bond, grants him to have received from Cornelius Crawfurd of Jordanhill, the sum of L.754; and for the said Cornelius his surer repayment thereof, he infefts him in an annual of L.44. 12s. 8d. as effeiring to the said sum of L.754, to be uplifted out of the three merk land of Carreask and Balingoune, within the Lordship of Cavell and Sheriffdom of Argyle. Cornelius afterwards coming to know that the said Mr. Ninian had some monies in the parishioners' hands, he arrests the same: and then (Mr. Ninian being dead,) he pursues to make furthcoming; summoning thereto the relict and his son, with his curators for their interest, if he any have. For instructing his summons, [he] produces in presence of the Lords the bond granted him by Mr. Ninian, his instrument of seasine, with the letters of arrestment, and their executions; and what cannot be verified by thir, he is content to refer to the defenders (in whose hands the arrestment was made) their oaths of verity.

This the Lords found relevant; and therefore assigned him a day against which he should summon them to that effect. Which he having done, and they failyieing, they were held as confessed; and decreet given against them, ordaining them to answer the pursuer in his desire of the libel.

Signet MS. No. 12. *folio* 4.

1663. *December* 1. THOMAS KINCAID *against* JAMES CRAWFURD.

ALEXANDER CRAWFURD, son to James Crawfurd, goldsmith in Edinburgh, by his bond, *in anno* 1648, obliges him to pay to Charles Watsone, writer in Edinburgh, and Mary Young his spouse, the sum of 2000 merks, with the usual annualrent thereof, with L.200 of expense in case of failyie. This bond Charles Watsone, *in anno* 1650, assigns to Mr. Robert Young, minister at Dumbarin; who, for his better security, obtains a wadset of a tenement of land in Halkerston's Wynd, appertaining to the said Alexander Crawfurd, redeemable upon payment of the foresaid principal sum. *In anno* 1653, Thomas Kincaid, chirurgeon apothecary, marrying the said Mr. Robert Young's sister, (their father was Mr. Andrew Young minister at Abercairne,) he dispones over to Thomas, by his translation, his right to the said bond and wadset: who immediately procures letters of charge, to enter heir within forty days, against Mr. James Crawfurd, son and heir to the said Alexander, conform to the act of Parliament; and thereon summons him and his

tutors, &c. to hear and see himself decerned to make payment of the said sum of money. For verifying of his summons, he produced the bond, contract of wadset, [and] assignation; with the contract of marriage, containing a translation; *item*, the letters of charge to enter heir, with their executions. Who failyieing to compear, the Lords decerned this pursuer to have good right to crave the said sum, and therefore decerned them to make payment to him thereof.

Act. Norvell. It's in absence. *Signet MS. No.* 13. *folio* 5.

1663. *December* 2. ALEXANDER MEINZIES *against* —— GORDON and ALEXANDER GORDON of Birsmoir.

GEORGE, Marquis of Huntly, Earl of ———, Lord Gordon and Badenoch, as principal; Patrick Gordon of Birsmoir, as cautioner; by their bond, *in anno* 1624, bind themselves to Jo. Urquhart of Cairnebroche, and failyieing of him by decease, to Thomas Meinzies of Balgounie, in the sum of 8000 merks. Thomas Meinzies acquiring right to the said bond, assigns and dispones the same, *in anno* 1642, to Alexander Meinzies, burgess in Aberdein; who, *in anno* 1655, before Thomas Gordon Sheriff-depute of Aberdein, the suits being called, and the Court lawfully fenced and begun, obtains decreet of transferring against —— Gordon, son to Lodovick Gordon, as heir, oy, or prenevoy, to the deceased George, Marquis of Huntly, principal debtor in the bond; and Alexander Gordon of Birsmoir, apparent heir to his father, cautioner therein: who as either having served themselves heirs to their predecessors, or behaved themselves as heirs to them, or are successors *titulo lucrativo post contractum debitum*, or intromitters with their goods and gear, or executors; at the least, as lawfully charged to enter heirs to them within forty days; by reason of one or other of the which titles, the Sheriff-depute found them liable for this debt, and decerned them to make payment of the same to the pursuer. Alexander Meinzies, who purchased this decreet, dies; whereupon his children (one of them is married to Mr. Arthur Gordon, advocate, who compears in this cause,) crave the same to be transferred over upon them *activè*. Which the Lords following, then sitting, *id est*, Sir Jo. Gilmor of Craigmillar, *President*, Sir Archibald Primros of Chester, *C. R.* Alexander Lo. Halkerton, Sir James Lockhart of Lee, Sir Archibald Stirling of Carden, Sir James Foulls of Colinton, Robert Nairne of Straffurd, Jo. Scougall of Whyte-Kirk, Andrew Ayton of Kinglassie, David Nevoy of Reddie, and Sir Jo. Hume of Renton; by their decreet, granted.

Act. Mr. Arthur Gordon. *Signet MS. No.* 14. *folio* 5.

1663. *December* 2. JOHN BEG *against* BROWNE of Fordell.

MARGARET ADAMSONE, by her bonds under her hand, granted her, *in annis* 1642, 1643, 1644, 1645, to have borrowed at sundry times, for performing sundry her necessary affairs, from Helen Beg, 980 merks, with the usual annualrent there-

of. The said Margaret Adamsone marrying Jo. Browne of Fordell, bears to him William and Sir Jo. William, *in anno* 1646, with consent of his curators, in corroboration of his mother's bonds, binds and obliges himself to pay the said sum to the said Helen Beg. After the granting of this his bond of corroboration, William dies. Sir Jo. Browne succeeds him, as also to the estate of Fordell. Sir John being killed, there is a son called John, that succeeds him. In the mean while, Helen Beg dies. Her brother Jo. Beg, in Nether Cramond, confirms her testament, *in anno* 1650, and gets himself nominated her executor dative; and so on that title charges the said John Browne to enter heir to his father, Sir John, *in anno* 1653. This John dies, whereon his sister Antonia Browne becomes heretrix of all. Now he charges her to make payment to him of the said sum of 980 merks contained in the bond of corroboration granted by William Browne, her uncle on the father's side, and that as heir to her brother, who was again heir to their father, Sir John, who again succeeded to his brother William, who by his bond of corroboration obliged him to pay that debt of his mother, M. Adamsone. For proving of the summons, there is produced the bond of corroboration; Helen Beg's testament confirmed, under the subscription of James Wright clerk to the commissariot of Edinburgh, wherein this debt is also confirmed; *item* the letters of charge to enter heir, executed against her brother.

ALLEGED for the defender, that no process can be granted on this bond of corroboration, unless the four principal bonds thereby corroborated, were produced.

ANSWERED, that process must be granted upon the said bond, without necessity to produce the bonds corroborated; unless the defender offer her to prove that the said bonds were paid or discharged.

REPLIED, that notwithstanding of this answer, the former allegeance of a necessity of production of the bonds corroborated stands relevant: seeing it is an unanswerable presumption that the said principal bonds, being satisfied, have been retired; only the bond of corroboration has been omitted to have been given up.

This allegeance and reply the Lords repelled, in respect of the answer thereto. Then ALLEGED by the defender, that the haill four bonds corroborated, are in the said Antonia Browne and her curators' hands, as cancelled and satisfied bonds. This the Lords found relevant, and assigned them a day for proving thereof, by production of them. Which they failyieing to do, the term is circumduced against them; and decreet pronounced ordaining her to make payment to the pursuer, of the said sum.

Act. Norvell. *Alt.* Mr. Laurence Oliphant and Mr. William Maxwell. J. A. *Signet MS. No.* 15, *fol.* 5.

1663. *December* 3. ELIZABETH COLVILL, and WILLIAM DALGLEISH'S BAIRNS, *against* The EARL of CASSILLS.

JOHN, Earl of Cassills, *in anno* 1649, grants him, by his bond, to have borrowed from Mr. William Dalgleish, Minister at Cramond, the sum of 6000 merks; which he obliges him to restore, with the ordinary [annualrent,] and 600 merks of penalty.

This obligation, *in anno* 1662, Mr. William assigns to Elizabeth Colvill, his spouse, in liferent, and the same to his bairns in fee; that is to say, 500 merks of it to his son John, 3000 merks to his daughter Anna, 2500 merks to his daughter Janet. Mr. William dies. The relict and bairns pursue the Earl of Cassilis for payment. For verifying the summons, there are produced the obligation and assignation thereto. The Lords ordained the said Earl (who compeared not) to make payment of the said bond.

Act. Mr. Thomas Lermonth. *Signet MS. No.* 16, *folio* 5.

1663. *December* 3. HUGH SINCLAIR *against* JOHN JOHNSTON of Corryphrin, WILLIAM SCOT, and OTHERS.

JAMES, Earl of Annandale, (therein designed Earl of Hartfield,) *in anno* 1657, before the Sheriff of Dumfries, obtains decreet against John Johnston of Corryphrin, William Scot in Pomadie, and others, charging them to make payment to him of certain sums of money, resting owing unpaid by them, as part of the rents of the lands possessed by them for the crops of 1655, 1656. Upon this decreet he raises letters of horning. Then they are denounced, and lay year and day at the horn; whereby their liferent escheat falls in Richard, Lord Protector, his hands, and to be in his gift and disposition. *In anno* 1659, Andrew Martin, Writer in Edinburgh, gets the gift of their escheats. Immediately Andrew assigns and dispones over his said gift to Hugh Sinclair, Chamberlain to the Earl of Annandale; who, thereupon now raises summons of declarator, summoning them to compear before, &c. and to hear and see it declared that they were orderly denounced rebels, and put to the horn, in manner, at the time, and for the causes, above written; and that they lay year and day thereat unrelaxed: and so that the liferent escheat of all their goods and gear they possessed the time of the denunciation, or that has accressed to them sincesyne, were at Richard, Lord Protector, his gift, and were disponed by him to Andrew Martin, who has assigned the same to this pursuer; who, therefore, has only undoubted right to the said goods, and ought to be answered and obeyed thereof. For verifying the summons, there are produced, the decreet; the letters of horning following thereon, with their denunciation; his assignation thereto; then the gift to the escheat, and the assignation to the said gift.

In respect whereof, and that nobody compeared for the defenders, to allege any reasonable cause in the contrary; the Lords decerned conform to the summons.

This summons is also raised at the King's Advocate's instance, for his Majesty's interest. King's Advocate's depute is Mr. George Norvell.

Act. Mr. Robert Sinclair.

3 *Signet MS. No.* 17, *folio* 5.

1663. *December* 3. JAMES GRANT *against* WILLIAM PHILP, MARGARET MACLAUCHLANE, and ——— BROWN.

DUNCAN PHILP in Comrie parish in Pearthshire, begets on Margaret Maclauchlane a child, called William Philp, whose name he puts in a bond of 400 merks, addebted to him by James Brown in Balichargie. This William dying, the said sum was found to pertain to the king, as being fallen in his hands by reason of bastardy, escheat, or last heir; the said William having been born a bastard, and so deceasing without bairns lawfully procreated of his own body, or any lawful assignation or disposition of the said sum made by him to any, during his lifetime, or at least because the said William has none to succeed to him within the tenth degree of his generation. James Grant, servitor to William, Duke of Hamilton, *in anno* 1663, gets the gift of the said bastardy from the king, under his Highness' privy seal, and so with concourse of the king's advocate, raises summons of declarator against the said bastard's mother, as nearest of kin, and against the son and heir of the said James Browne, granter of the bond: summoning them to compear and hear it found and declared by the Lords, that the said bond is fallen in the king's hands, gift, and disposition, by reason of bastardy; and so that it appertains now to James Grant, this pursuer, as his majesty's donator; and that he ought to be answered, paid, and obeyed thereof.

The Lords decerned and ordained the same to belong and appertain to this pursuer, conform to the desire of the summons, because of the letter of gift under the privy seal produced.

And albeit, it was alleged by the defender's procurators, that no process could be sustained upon the foresaid gift of bastardy, because he offered him to prove that Margaret Maclauchlane, the alleged bastard's mother, was married to his father; at least, that he cohabited with her many years as his wife, and were *habiti et reputati* as married folks; and so the said William cannot be held a bastard: —Whereto it was REPLIED by the pursuer's procurator, that the said allegeance was noways relevant, unless he would offer to prove that they were married, and that they cohabited and dwelt together as married:—

Notwithstanding of which reply, the Lords found the allegeance made by the defender relevant, and therefore assigned him a day for proving the same; also granted him letters for summoning witnesses, or leading any such like probation, or documents to that effect; which he failyieing to do at the day assigned, the term was circumduced against him, and decreet given furth in manner above written.

Sir John Fletcher compears personally. *Act.* James Abernethy. *Alt.* Mr. Jo. Rollo. *Signet MS. No.* 18, *folio* 6.

1663. *December* 3. THOMAS FALCONER younger of Kincorth, and ALISONE KELLIE his Spouse, *against* PATRICK HOME of Coldinghamelaw.

BY a minute of contract and agreement betwixt Patrick Home of Coldinghamelaw, and Margaret Greirsone, his spouse, on the one part, and Thomas Falconer,

younger of Kincorth, and Alisone Kellie, his spouse, on the other side, past in July, 1662; the said Patrick Home sells and dispones so much of his lands, living, and estate, as would extend to, be worth, and pay, of constant yearly rent, now, and in all time coming, the quantity of four chalders, and four bolls, of good and sufficient bear, of the old met and measure of Duns; *item*, To enter the said Thomas to the void actual and real possession of the said lands; *item*, To warrant them at all hands; *item*, To deliver him the keys of the houses on the said lands; *item*, To aid, assist, and concur with him in defence of his real, actual, and peaceable possession thereof; *item*, To extend, keep, and perfyte the said minute of agreement betwixt them on the first occasion. This minute, in January, 1663, Thomas causes registrate, and charges Coldinghamelaw with letters of horning, for not fulfilling the same; and, therefore, to pay the 1000 merks of penalty contained therein. This charge Coldinghamelaw suspends, on thir reasons: 1*mo*, Because the same is altogether general, noways condescending in what particular obligement of the said contract he has failyied, seeing he is yet most willing to fulfill them all; and, therefore, till a special condescendence be made, the letters ought to be suspended; 2*do*, In September, 1662, he offered to the charger a just and true rental of sundry persons, his tenants and fermorars, within his barony of Law, that have been in constant use of paying to him for their lands, four chalders and four bolls of the met of Duns; desiring him to accept thereof as the implement of the said contract; *item*, What inhibitions, comprisings, infeftments, tacks, or other rights, might affect the lands offered, he was content, upon their mutual subscribing of the contract, at the sight of able and judicious lawyers, to purge the same; which the charger refusing to accept, he took instruments in Robert Pow's, a notary's hands, that he might be free of the penalty charged for: by which it appears how willing he was to perfyte the said minute, in every point thereof, and how unjustly he is now charged.

This suspension being called; for the charger, the contract registrate is produced: for the suspender, his protestation: all which being considered by the Lords, they granted commission to Home of Blacader, and Ramsay of Idinton, to try the rent of the said lands offered by the suspender, by whom they are possessed, for what farms, to clear their marches from the neighbouring lands, to consider their tacks, and for that effect to call the said parties before them, and then to report; which they accordingly did, some refusing to give their declarations upon the quantities of the lands possessed by them, and so reported. Their report the Lords found defective in the quantity of bear controverted, (there being much oats in their rentall:) whereupon they grant a new commission to the Lord Justice Clerk, as knowing the lands, bounds, and parties, to cognosce upon the validity and difference betwixt the bear and the oats paid out of the lands designed; which he having seriously considered, his report was, that he found the rentall of the lands offered, to want some fourteen bolls bear to complete the four chalders and four bolls bear, met and measure foresaid, for which may be allowed nineteen bolls of oats paid out of the two husband lands beside.

This report the Lords having considered, they approved of the same, interponed their authority thereto; and decern the letters of horning to have further execution, as being orderly proceeded, ay and while the suspender fulfil, perfyte, and accomplish all and haill the clauses, heads, articles, and conditions of the said

minute, as they are before deduced; as also ay and while he purge all and haill the burdens affecting the said lands to be given up in a note by the charge; [and] till which time, that the writs and evidents produced lie in the clerk's hands.

Suspender, Mr. Alexander Spottiswood. *Alt.* Mr. David Falconer.

Signet MS. No. 19, *fol.* 6.

1663. *December* 3. HELEN HILL *against* LAUCHLANE MACLEINE of Lochburie.

MURDOCH MACLEINE of Lochburie, by his bond, binds, obliges him to content and pay to Helen Hill, relict of Jo. Maxwel, burgess in Glascow, the sum of L.800. *In anno* 1657, she registrates the bond and raises letters of horning thereupon. He suffering himself to be denounced, she obtains letters of caption: by which having apprehended him, he grants her a bond of corroboration of the said sum, with this addition, that if he did not thankfully pay her betwixt and Martinmas 1657, that then he should enter himself prisoner immediately to the governor of Divart, and that under the pain of L.500. He neither pays it within the term of payment, nor does he enter his person, according to his engagement, but dies a little after. His brother Lauchlane Macleine serves and retours himself heir to him. Helen Hill, (who married afterwards Mr. William Weir, advocate,) she pursues Lauchlane Macleine now of Lochburie, to make payment to her of the sums contained in the bond of corroboration; and, for instructing the summons, produces the bond corroborated, the bond of corroboration, letters of horning, and caption, together with an extract of a service under the subscription of Mr. Archibald Nisbet notary, bearing Laughlan M'Laughlan, [Lauchlane Macleine?] to have been heir served and retoured to his brother, before the four ordinary maissers, in January, 1663.

All which the Lords having considered, they decerned the defender to make payment of the said bond: because, albeit, the time of litiscontestation in the said matter, it was alleged by the defender's procurator, that he ought and should be *simpliciter* assoilyied from the said summons, because he offered him to prove *paid*: which allegeance the Lords admitted as most relevant, and therefore assigned him a term for proving thereof, which he failyied to do; so that the term was circumduced against him, and protestation admitted in favours of the pursuers, and decreet given as is above written.

Act. Mr. Robert Burnet. *Alt.* Mr. George Mackeinzie.

Signet MS. No. 20, *fol.* 7.

1663. *December* 5. JOHN ARTHUR of Newton-Arthur *against* JAMES HOUDON.

WILIAM HOUDON smith in Restalrig, by his bond, grants him to have borrowed, in 1623, the sum of L.340 from Patrick Whytlaw, burgess in Edinburgh, and obliges him to repay the same. This bond Patrick, *in anno* 1624, causes registrate, and immediately raises letters of inhibition against the said William;

then, *in anno* 1628, assigns the said bond, with the diligence done thereon, to John Arthur of Newton-Arthur. About this time the said William dies. The assignee charges James Houdon, his son, to enter heir to his father, and obtains decreet of transferring against him, declaring that what right, action, title, or process, Patrick Whytelaw, his cedent, would have had against William Houdon, the same the Lords grant to him against William's son. *In anno* 1648, John Arthur the assignee dies. His son, Mr. Jo. serves and retours himself heir to his father, confirms his father's testament, and gets himself nominated his executor; then assigns this debt to his brother Alexander: who raises now a summons of transferring, craving the said debt to be transferred in him *activè*, and in the said Ja. Houdon *passivè*. For verifying the summons there is produced, first, the principal bond; then the decreet of registration and letters of inhibition served thereon; then the assignation made to Jo. Arthur; then the decreet of transferring obtained at his instance; then the extract of Mr. Jo. retour to his father, under the subscription of Sir Jo. Scot of Scotstarvet, then director to his Majesty's chancellary; then his father's confirmed testament, and then his brother Mr. John's translation of it over on him: all which the Lords finding to prove the summons relevantly, they transferred the same by their decreet.

Act. Mr. George Norvell. It's in absence.

Signet MS. No. 21, *fol.* 7.

1663. *December* 5. ARCHIBALD and ALEXANDER STEWART *against* MARGARET WARDLAW, ROBERT PITTILLO, WILLIAM BAILLIE, and OTHERS.

THE tenants of Killernie, Bandrun, and Steilend, lying within the regality of Dumferling and sheriffdom of Fyfe, raise a summons of multiplepoinding against Margaret Wardlaw, relict of Lieutenant-General William Ruthen and Mr. Robert Pittillo, her spouse, for his interest, on one part; Archibald and Alexander Stewarts, brothers to the laird of Rossayth, on the second; Earl of Tweddale, on the third; George Wardlaw, brother to the laird of Pitrevie, on the fourth part; Mr. William Bailzie, writer in Edinburgh, on the fifth part; and Mr. John Anderson, minister at Sauching, (within which parish the lands lie,) on the sixth part: summoning them to compear before the Lords, &c. to hear and see it declared which of the said persons has best right to the maills, farms, and duties of the said lands; that the said pursuers may make payment of them to them, and that the rest may be discharged of all calling, troubling, pursuing, or arresting the said tenants for the same. In this action compearance is first made for Archibald and Alexander Stewarts, who, for instructing their right and interest to the maills of the said lands, produce two bonds, containing precepts of seasing, granted by the said L. G. Ruthen and Margaret Wardlaw, his spouse, to the said two brothers, for certain great sums of money contained in the bonds, with two seasings (one taken by each of them) following thereon, with a summons of poinding of the ground, at their instance, against William Ruthen, now proprietor of these lands, son and heir to the [said] L. G. Ruthen, and his mother M. Wardlaw, liferentrix thereof, and her husband for his interest.

Compears, by his procurator, Mr. William Bailzie, and ALLEGES, he ought to be preferred to the said Archibald and Alexander Stewarts, because he has right by disposition made of the said lands to his father, James Baillie, long before their rights.

REPLIED for the brothers, that Mr. William Baillie ought to be repelled, because they offered them to prove that L. G. Ruthen, their author, was seven years in possession, which puts them in *judicio possessorio*, they succeeding to him; and so must have a sentence for poinding of the ground, and be preferred to Mr. William. To the which it was

DUPLIED, by Mr. William, that whatever possession the said L. G. Ruthen their author had, it was violent, at the least vicious, because apprehended after that his author had obtained decreet of removing from the said lands. Whereto it was

TRIPLIED, that no respect can be had to any decreet of removing obtained at the instance of Mr. William's author, because their author, L. G. Ruthen (who was both infeft in the said lands, and was seven years in possession thereof,) was not called thereto. Likeas, in fortification of what has been said, it is offered to be proven that James Bailzie, Mr. William's father and author, did before his decease denude himself of any right he had to the said lands in question, in favours of L. G. Ruthen, their author. This reply and triply for Archibald and Alexander Stewarts, the Lords found relevant to be proven *scripto*, notwithstanding of the allegeance and duply made in favours of Mr. William Bailzie; and therefore assigned them a term for proving the same by production of such writs, documents, and others, as they would judge necessary to use. And because the writs whereby they intended to prove their said reply and triply were not in their own hands; therefore they protested for an incident diligence against the havers of the same: which protestation the Lords admitted. Whereupon the saids Archibald and Alexander raise a summons of incident diligence against Mr. Robert Pittillo, advocate, and his spouse, M. Wardlaw, Mr. James Winrahame of Wouston, and Robert Leggat, writer in Edinburgh, one or other of them; either as having had the said writs, or as having fraudfully put them away; to exhibit all writs or evidents granted by whatsoever persons, specially by Bruce of Alboth, Inglis of Ingliston, Catharine Bennet, &c. (here is a long catalogue of writs deduced) to the said L. G. Ruthen of the said lands of Killerny and others, that thereby they may prove their said reply and triply, admitted to their probation, and that they being found to have best right to the said lands, may keep and use the same as their own proper writs and evidents: all which they referred to their oaths of verity *simpliciter*. All which the Lords found most relevant, and therefore they granted a term to the pursuers for summoning them to that effect; with certification that they failyieing, they should be holden for confessed; which all being done accordingly, and they cited personally by a messenger at arms, they failyied to compear to give their oaths; whereupon they were holden as confessed, and ordained to exhibit and produce the said writs called for, under the pain of horning, to be granted on fifteen days, &c.

In the action of multiplepoinding, for Archibald and Alexander Stewarts, compear Mrs. George Norvell, and William Maxwell; for Mr. William Bail-

lie, compears Mr. Jo. Harper: in the incident, the pursuers compear *ut supra*. *Alt.* Mrs. Robert Pitillo and Mr. John Eleis.

Signet MS. No. 22, fol. 7.

1663. *December* 5. JAMES HAMILTON *against* PATRICK CAMPBELL of Duntroon's TENANTS.

IN April 1657, Pat. Campbell, elder of Duntroon, as principal, and John Ca. fiar thereof, his son, as cautioner, bind them to content and pay to Robert Hamilton, burgess of Glasgow, the sum of L.160. This bond is registrate in the Sheriff-Court book of Inverarie in 1658; then he assigns it to James Hamilton, also burgess there, who immediately thereon raises letters of poinding and horning, containing arrestment, whereby he arrests in the said Duntroon's tenants' hands the farms and duties of their lands for the crop and year of God 1662; then pursues for making forthcoming, calling also Duntroon for his interest. For verifying the summons there is produced the registrate bond, the assignation thereto, the letters of poinding, horning, and arrestment, duly executed, raised thereon; and for the remanent points of the summons not verified nor instructed by the writs produced, refer them to the defenders, (in whose hands the victual is arrested) their oaths of verity. Whereupon their procurator takes a day to produce them for that effect, and protests for a qualified oath; the pursuer's procurator protests in the contrary. They not compearing at the day, the term is circumduced against them, and they ordained to make the said victual arrested forthcoming to the pursuer, in payment to him, as assignee, of the sums of money contained in the said bond.

Act. Mr. Robert Sinclair. *Alt.* Mr. George Mackeinzie and William Braidie.

Signet MS. No. 23, fol. 8.

1663. *December* 5. ALEXANDER BALNAVES, Minister of Tippermuire, *against* GEORGE MURRAY of Tippermuire.

IN anno 1669, there is a contract of excambion past betwixt George Murray of Tibbermuire, and Mr. Alexander Balnaves minister there: whereby George binds and obliges him to possess the minister in the yearly duty and avail of eight acres of land; and the minister obliges him to procure from the presbytery of Perth a right or disposition of the old glebe of the parish of Tippermuire to the said George. *In anno* 1662, the minister registrates the contract, and summons Tippermuire to perform his part of the contract, and obtains decreet against him; whereupon he raises letters of horning, charging him to obey the said decreet, that ordaining him to pay to the charger the yearly duty of eight acres of land conform to that contract. Thir letters Tippermuire suspends on thir reasons: 1*mo*, Because the foresaid charge is altogether general, only for two years duty of the said eight acres of land; neither condescending upon the species or kind of the said duty, whether victual or money, nor yet on the quota or quantity thereof, nor

yet for what years of God the same is due and payable; so that the suspender cannot, nor knows not, what obedience to give thereto. *2do*, We have seen the pretended contract, ground of the said decreet suspended, to be conditional, and to contain mutual obligements: but so it is, that the said minister never procured the said right conform to the tenor of the contract; till which be done, the suspender can no ways be obliged to make payment to him of the said duty charged for, albeit its species and quantity were condescended on, as is not. *3tio*, Offers to prove that he left the said eight acres excambed free to the minister, for him to enter to the possession thereof; so that, after the said contract, he meddled therewith neither by tilling or pasturing: but if the said minister suffered the same to lie lea and waste, *sibi imputet*; that is *propria illius culpâ*; he cannot charge the pursuer with the duty thereof. Then summons him to compear and hear and see the said decreet and all that has followed, or may follow thereupon, suspended *simpliciter*. Mr. Alexander getting a copy of this suspension, and seeing the main reason thereof to be the non-liquidation of the yearly duty or quantities thereof, he liquidates it most craftily himself, and summons him then before the Commissary of Dunkeld; charging him to make payment to him of 313 merks, 4s. 4d. as if it had been contained in the decreet obtained before the Lords; and by that slight, (suppressing the cause or ground of the said pretended debt,) recovers decreet against him: Tippermuire not thinking himself obliged to compear, because he had a suspension standing undiscussed of the very ground of this charge now to compear before the Commissary. Upon his decreet he obtains a precept charging him to pay the sum contained in the decreet, under the pain of rebellion and escheating, &c. This charge he again suspends, upon this reason, besides the others deduced in the first suspension; that the ground of this decreet being suspended, and yet standing undiscussed, it were absurd to suit any execution upon a commissary's decreet or precept for the same debt; they being also consequentially and dependantly suspended. At last, the suspensions being called, the minister's procurators are content that the reasons of both the suspensions be discussed *simul et semel*. And to them all, the charger oppones, *first*, his decreet obtained *in foro contradictorio*. Then for that, that the suspender left the said eight acres of land, conform to their contract, free for the charger to enter thereto; he offers him to prove that he was interrupted by the suspender himself, or his servants, by commission from him, in the peaceable possession of the same.

Which defence the Lords found relevant; and so assigned him a day for proving the same: who, at the day, produced some witnesses; who being on oath examined, their depositions were found unclear; and, therefore, the Lords, before advising the cause, grant full power and commission to Mr. John Nairne, sheriff-depute of Pearth, to try if there was any such interruption, yea or no; and ordain the charger to report at such a day: which, the day being come, he failyied to do; and, therefore, the Lords suspended the said letters, with all that has followed thereupon *simpliciter*.

Act. Mr. Thomas Murray. *Alt.* The Minister, Mr. Nathaniell Fyfe.

Signet MS. 24, *folio* 8.

1663. *December* 8. JOHN FLOYD and BRIDGET TURNE *against* ANDERSON, and other Tenants to the Duke of LENNOX.

In anno 1645, James, Duke of Lennox, binds and obliges him to pay to Mr. David Buchanan the sum of 1000 merks. This bond Mr. David assigns over to Mr. William Buchanane; which Mr. William, by his translation, dispones the same to John Floyd, gentleman in the city of London, and Bridget Turne, relict, and executrix confirmed to the deceased Jo. Turne; and in their name, and his own, as factor, registrates the bond, and thereupon raises letters of horning, poinding, and arrestment, against the Duke's tenants within his barony of Kilmarnock, to pay to him and them their maills, farms, and duties, aye and while he be completely satisfied of the said bond; summons each of them for 1000 merks, less or more. This charge they suspend, because, 1*mo*, For null defence, and not compearance, never having been summoned; 2*do*, Because charged for 1000 merks the piece, whereas some of them pay not 40 merks Scots; 3*tio*, The time of the arrestment, (which was in 1661,) they were not liable in payment of their farms and duties to Charles, now Duke of Lennox, because not then entered heir; but they paid them to Mr. Lo. Cochrane, as factor for the executors of this Duke of Lennox his predecessor, and obtained his discharge thereon, which at the discussing of the suspension they proffer to produce. At the calling of the suspension, there is produced for the charger the bond, with the assignations and translations thereof; *item*, the letters of horning and arrestment, duly executed, raised thereupon. All which, with the reasons of suspension, being ripely considered by the Lords, they find the letters orderly proceeded, aye and while the said tenants make payment of the sums arrested in their hands by the pursuer, as far as will satisfy the debt acclaimed.

Act. Sir George Lockhart. *Alt. Suspender*, Sir Thomas Wallace.

Signet MS. No. 25, folio 9.

1663. *December* 8. ALEXANDER BURNET of Carlips, and MARGARET HAY *against* JO. SCOT, WILLIAM BURNET of Barns, and Captain JOHN VEITCH.

Mr. William Burnet of Barns, as principal, and Captain Jo. Veitch, in Easterdaick, as cautioner, *in anno* 1654, bind and oblige them to repay the sum of 700 merks, borrowed by them from Mr. Alexander Burnet of Carlips, advocate. *In anno* 1655 Jo. Scot grants to the same Mr. Alexander his bond for 1000 merks. Mr. Alexander dies in 1657. His eldest son, Alexander Burnet, serves and retours himself heir to his father; then confirms his father's testament, wherein his mother, Margaret Hay, is nominated to him tutrix testamentar; then he nominates sole executor, and universal legatar, and intromitter with his goods and geir; *item*, therein are contained the foresaid bonds and debts. Thus, having acquired a right, he, and his mother as tutrix, pursue the said persons for payment-making to them of the said sums of money. For instructing of the summons, there are produced the extracts of the said three registered bonds;

then an extract of his service, or retour, out of O. S. L. Chancellary, under the subscription of Jo. Acheson, Depute to Sir William Ker of Hadden, Director to the Chancellary; then his father's confirmed testament, under the subscription of Mr. Alexander Swinton, clerk to the commissariot of Edinburgh. Compears Mr. George Norvell, for Mr. William Burnet and Captain Veitch, and then passes from his compearance. Compears Jo. Scott, by his procurator, and alleges that he ought to be assoilyied from the points of the said summons, because he offered him to prove that the sum libelled against him was assigned by the pursuer's father to Sir Michael Nesmith of Posso, and his assignation intimated to the said defender; and that, accordingly, he had made payment thereof to Posso.

Which allegeance the Lords found relevant, and assigned a day for proving the same: at the coming of which, because he failyied therein, the term was circumduced against him, and decreet given, as also against all the rest, ordaining them to make payment of the said sums to the pursuer.

Act. Mr. Robert Hay. *Alt.* Mr. Robert Sinclair.

Signet MS. No. 26, folio 9.

1663. *December 9.* Jo. Boyde *against* Major George Bruce.

Major George Bruce, son to Bruce of Clackmannan, by his bond, (which proceeded on some previous transactions anent warranting to the said Major the lands of Clackmannan, and for recovering to him such writs as might concern him for his security of the said lands; *item*, for making over to him a right of a comprising led against the said lands,) obliges him to pay 700 merks to Robert Younger, in Clackmannan, who assigns the same to Jo. Boyde, merchant in Edinburgh; but so that they should charge conjunctly. They having put the bond in the register, and got out letters of horning against him, he suspends, because, 1*mo*, The causes above rehearsed, of the granting the said bond, are not fulfilled to the suspender. 2*do*, The same money, before Jo. Boyde's assignation was intimated, was arrested in his hands at the instance of Robert Younger's creditors, which must be purged ere he can answer this pursuer. 3*tio*, The said charge is altogether general; charging the suspender to make payment to Jo. Boyde of as much as shall be found resting to the said Jo. after count and reckoning made betwixt him and Robert Younger; and whatsoever shall be more, it must be countable, therefore, to Robert Younger.

Notwithstanding thir reasons, at the calling of the suspension the Lords found the letters orderly proceeded, aye and while the Major should make payment to the pursuers of the said sum of 700 merks; yet withal decerned, that how soon he should do that, that then Jo. Boyde should be holden to assign and dispone to the Major the comprising led at his instance, for this and other sums, against Robert Younger, of the tenements and acres lying in and about Clackmannan; without prejudice to the said Jo. Boyde, his comprising the said lands for other sums of money yet resting owing, unpaid.

Act. Charger, Mr. David Thoirs. *Alt.* Sir Andrew Dick, Mrs. Lawrence Oliphant, and Jo. Colvill. *Signet MS. No. 27, folio 9.*

1663. *December* 9. JAMES, ROBERT, and MARGARET MITCHELL, *against* The COUNTESS of WINTON.

IN anno 1660, Dame Elizabeth Maxwell, Lady Winton, as principal, and Lady Jean Seaton, her daughter, as cautioner, bind and oblige them to content and pay to Catharine Morton, indweller in Edinburgh, the sum of 500 merks. In 1662, the said Catharine assigns the said bond to James, Robert, and Margaret Mitchells, (married to John Hastie in Prestonpans;) L.200 she ordains to come in equally betwixt the two boys; and 200 merks she assigns to the said Margaret, in liferent, and to her bairns procreated betwixt her and John Hastie, in fee. Before intimation is made of this assignation, the cedent dies. Thereafter, the assignees above mentioned, they registrate the bond in the Sheriff-Court books of Hadinton; and, by a precept obtained thereon, charge the Countess of Winton to make payment of the said bond. This charge she suspends, *1mo*, Because all charges given by virtue of not intimated assignations, are ever suspendible before the Lords of Session: but such was this charge. *2do*, The said suspender were *in mala fide*, to pay the said sum to the chargers, by virtue of their not intimated assignation; seeing the executors of the cedent may pursue her for the same, as given up in the defunct's testament; till such time, therefore, that she did see an assignation granted by the cedent's executors, or nearest of kin, in favour of thir chargers, she could not be *in tuto* to make payment to them. *3tio*, The suspender might either have been *in mala fide*, if she had obeyed the said charge: seeing the King, or his donator, might have pursued for the same, as belonging to them by reason of bastardy; the said Margaret, cedent, being born and deceasing a bastard, without any lawful disposition, duly intimated, made thereof; or else might have run the hazard of double payment of the same sum, which, in law, she is not holden to do. *4to*, The suspender cannot answer the said Margaret Mitchell and her spouse; seeing, by verie-pretended obligation, it appears that 200 merks of the said sum is only assigned to them in liferent, and the fee thereof to their bairns; and, therefore, till such time caution be found her for making the said 200 merks forthcoming to the bairns, and for her exoneration of her payment thereof, and for warranting her at their hands for now and ever, she cannot be obliged in payment of the said sum to them. *5to*, For the three years' annualrent of the said principal sum, she produces five discharges; the last whereof discharges the very last term's annualrent.

The Lords, by their decreet, assoilyie from all annualrents of the said principal, because of the said discharges produced; find the letters (notwithstanding of the reasons of suspension,) orderly proceeded; ordain them to be put to execution, ay and while the pursuer make payment [of the] principal sum; ordain, finally, the said Margaret Mitchell and her spouse to caution to relieve the Countess at their bairns' hands; which they accordingly do.

Suspender, Mr. Laurence Oliphant. *Alt.* James Chalmers.

Signet MS. No. 28, folio 9.

1663. *December* 9. NEILL MACNEILL of Dallilougart *against* COLIN CAMPBELL of Artenay, JOHN CAMPBELL of Artarich, &c.

NEILL MACNEILL of Dallilougart, serves and retours himself, in 1662, heir to his goodsire; then pursues Colin Campbell of Artenay, John Campbell of Artarich, and others, for exhibition and delivery to him of some writs, rights, evidents, securities, infeftments, and charters of his lands, granted by the Earls of Argyle to his said goodsire, or any of his predecessors, of the said lands; (here the writs are deduced.) The defenders's procurators take a day to produce their clients, for giving of their oaths anent the points of the summons, and their having the said writs; which they failyieing to do, the term was circumduced against them, and they holden as confessed, and so decerned to exhibit and deliver the same to the pursuer, to be used by him as his own proper writs and evidents.

Act. Sir George Lockart, and Mr. Jo. Harper. *Alt.* Mr. Robert Sinclar, and George Mackeinzie. *Signet MS. No.* 29, *folio* 10.

1663. *December* 10. FRANCIS ARNEILL *against* JO. KER.

FRANCIS ARNEILL, merchant in Edinburgh, one of the owners of the good ship called Peter of Prestonpans, inputs and constitutes Jo. Ker, in Pans, their skipper and master thereof, to carry over in it some soldiers to Hamburg. At Leith, he (Arneill) buys 2000 weight of white biscuit for L.220 Scots; 500 lbs. weight of butter, L.135; 5 tons of drinking beer, with cask, L.150; 2 barrels of beef, L.26; 2 barrels of Lews herring, L.24; 104 lbs. weight of tobacco, L.52; 3 bolls oat meal, L.15; 22 pints of strong waters, L.24; amounting in all to L.546; and puts it therein. *In anno*, 1656, (which was the time of Cromwell's war with the Hollanders,) this ship, coming back from Hamburgh, is taken by Captain Adrian Coats, and sold by him to Robert Fyfe and Jo. Delang, indwellers in Stravanger, and David Davidsone, in Copperwick, in Norway. Jo. Ker, skipper, coming home, by his ticket grants all these provisions to have been undisposed of, in the said ship (the 22 pints of strong waters only excepted,) even at their coming from Hamburgh, and of their taking; and binds and obliges him, betwixt the date of thir presents and August 1658, to procure and purchase testificates under the hand of the said Captain Adrian, or his lieutenant or skipper, or some inferior officer of the said ship, or under the hands of those above mentioned that bought it, that the said victual and goods were in the said ship the time of her taking; or else, in case of failyie, to refund to the said Francis the prices mentioned in the particular account above written. This the skipper failyied to do: whereupon the merchant pursues him for to make payment to him of the prices of the said goods, conform to his ticket.

ALLEGED for the defender,—No process can be granted at this pursuer's instance, against the defender, for the 22 pints of strong waters, because the defender's bond or ticket libelled upon does not acknowledge the same.

REPLIED,—That he was content to restrict his summons to the goods contained in the said ticket.

ALLEGES, *2do*,—No process yet; because [the defender] offers to prove that the goods above written were taken out of the said ship, as she was coming from Hamburgh; and that by testificates under the hands of the parties mentioned in the ticket. Which allegeance the Lords found relevant, and assigned him a day for proving the same. At which day, he failyieing, the term is circumduced against him, and decreet given forth, ordaining the said Jo. Ker to make payment of the prices of the said goods, as is contained in the pursuer's account homologated by him.

Act. Mr. William Hog. *Alt.* Mr. Robert Deans.

Signet MS. No. 30, *folio* 10.

1663. *December* 11. ISOBELL, &c. AIKENHEAD, &c. *against* CORNELIUS INGLIS, of Newtonlies.

IN anno 1639, Patrick Inglis of Elphinston, as principal, and Mr. Cornelius Inglis of Newtonlies, as cautioner, by their bond, grant them to have borrowed from Mr. Harie Aikenhead, minister at North-Berwick, 4000 merks, which they oblige them to repay. The same two, *in anno* 1647, by another bond, bind and oblige them to content and pay to the said Mr. Harie 3000 merks, borrowed by them from him, by and attour the 4000 merks contained in the bond, 1639; (this clause it has.) Mr. Harie, in 1648, assigns the bond granted in 1647 to his son Archibald. He enters heir to his father on his decease; and assigns to his sister Isobell, married to Ja. Rig, the equal half of the bond of 4000 merks, granted to his father *in anno* 1639, with the equal half of the penalty contained therein, and annualrents thereof, then resting owing, unpaid. He dies. The two sisters immediately confirm their brother's testament, and get themselves nominated executors to him; then, with concourse of their curators, Mr. James Pilans Regent, and the said Ja. Rig, spouse to Isobell, they pursue Mr. Cornelius to make payment to them of the said bond in 1647, of 3000 merks; because they are confirmed executors to their brother, who was heir to their father; yea, had an assignation thereto from his father, in whose favours the bond was granted: *item*, of 2000 merks, as the equal half of the bond of 4000 merks granted in 1639, to which they have right by virtue of their brother's assignations made thereof to them.

All which the Lords considering, they decern the said Mr. Cornelius to make payment of the sums called for.

Act. Mr. William Beaton. It's in absence.

Signet MS. No. 31, *folio* 10.

1663. *December* 11. BARBARA MORISON, Widow of THOMAS MORTIMER, *against* THOMAS MORTIMER, her Son.

IN anno 1629, there is a contract matrimonial made and subscribed betwixt Mr. Jo. Mortimer, bailie and burgess of Aberdein, and Thomas Mortimer, his son, on the one part; and Barbara Ferguson, mother to Barbara Morison, her daughter, with consent of George Morison, her brother, afterwards provost of Aberdein; wherein the said Thomas Mortimer binds and obliges him to solemnize the bond of marriage with the said Barbara Morison: *Item*, he and his father bind and oblige them and their heirs, to ware, employ, and bestow 12,000 merks on lands or annualrent, when the best occasion may be had of employment of the same: and that to be forthcoming to the said Barbara in liferent, at the least 720 merks, as the ordinary annualrent thereof; and to the bairns to be procreated, in fee. This obligement neither in her husband's time, nor in his father's time, is performed: whereupon, her husband dying, she charges Thomas Mortimer, her son, to enter heir within forty days, conform to the act of Parliament; and then summons him to compear, &c. to hear and see himself decerned to fulfil his father's contract of marriage with her, conform to equity, reason, and the tenor of the foresaid contract. In this action, he compears, and produces a renunciation under his hand, to be heir to his father. Upon the production whereof, his procurator craves protestation that he may be free from this action. Which the Lords admitted, assoilyieing him from the haill points of the said summons; yet ordain sick action and process to pass against him at the pursuer's instance, *cognitionis tantum causa*, as if he had entered heir to his said father; that she and the other creditors may have action of adjudication *contra hæreditatem jacentem et bona mobilia*; which the Lords decerned, upon protestation made by the pursuer's procurator.

Act. Patrick Fraser. *Alt.* Mr. David Dinmure, Jo. Murray.

Signet MS. No. 32, *folio* 10.

There is another decreet given, betwixt the same parties, deducing the forementioned summons; only, in this second decreet he is charged to enter heir on sixty days, as furth of the country. No compearance is made for him; no mention of his renunciation to be heir. *Simpliciter* he is charged, decerned, and ordained to fulfil the said contract of marriage to the pursuer.

I take this to be the decreet *cognitionis causa*.

Signet MS. No. 33, *folio* 11.

1663. *December* 11. JAMES HAMILTON *against* SIR ALEXANDER HAMILTON of Hags, WILLIAM MURRAY, WILLIAM COCHRAN of Ruchsoalls, MUNGO MURRAY of Carlaverock, and PATRICK MURRAY of Keillor.

SIR ALEXANDER HAMILTON of Hags, William Murray, portioner of Longhermiston, (which part Mr. Robert Deans has now,) Mr. William Cochran of Ruch-

soalls, Mr. Mungo Murray of Carlaverock, and Patrick Murray of Keillor, by their bond, dated 1660, grant them to have borrowed from Jo. Hamilton, of Bangour, the sum of 4000 merks, which they oblige them to repay to him, and Marion Hamilton, his spouse, her liferent use thereof; and, for his surer repayment, they oblige them to infeft and sease him in an aunualrent effeiring to the said sum, which shall ever be redeemable on payment of the said sum: *item*, declared that if Bangour, and his foresaids, choose rather to uplift their money than to retain the said security, in that case they bind and oblige them to make good and thankful payment thereof, without any premonition or requisition to that effect. Bangour in 1663 dies. His son Jo. (Cut-the-wind) serves and retours himself heir to his father; then, with consent of his mother, assigns the bond to Ja. Hamilton, merchant in Edinburgh, who summons the parties before-named, granters of the bond, to hear and see them decerned to make payment to him of the said sum. The Lords decern conform to the desire of the summons; because the defenders, compearing by their procurators, alleged no reasonable cause in the contrary; *item*, because the Lords saw the said bond, assignation, and retour.

Act. Mr. Thomas Lermonth. *Alt.* Mr. Robert Sinclair, John Harper, and Nathaniel Fyfe.

Signet MS. No. 34, *folio* 11.

1663. *December* 12. ANDREW KER *against* The MAGISTRATES of COUPER.

THERE is a contract, in October, 1652, made betwixt Sir Ja. Melvill of Hallhill and Bruntiland, on the one part; and George Jameson, provost of Couper in Fyfe, with the remainant council thereof, taking the burden upon them for the body and community of the said burgh: wherein Hallhill sets to the town of Couper a tack of the teind sheaves and burgh acres of the corn-field land about the town; wherefore they oblige them in payment yearly to the said Sir Ja. of L.500. *In anno* 1654, Sir Ja. assigns and dispones this contract to Mr. Andrew Ker, advocate. Mr. Andrew, by his translation, dispones to Mr. Andrew Ker, clerk of Linlithgow; who, charging the magistrates of Couper therefore, they suspend, upon multiplepoinding; the same sum being also arrested in their hands, at the instance of Sir. Jo. Weymes of Bogie, Sir Robert Farquhar of Monnie, Andrew Balfour, and James Melvill, burgesses in Edinburgh; and consigns in Mr. Thomas Hay, clerk to the process, his hands, the sum of L.800, addebted; which they are most willing be made forthcoming to any the Lords shall find to have best right thereto, upon their sufficient acquittance and discharge thereof; and providing the Lords ordain all the rest to desist from troubling the suspenders for payment thereof. Compear, on the calling of this suspension, the charger's procurators; and produce for them, the registrate contract, the assignation, and translation thereof. Compear procurators for the arresters, and produced their discharge of the said arrestment, wherein they declared they passed from their arrestment, in favours of the charger.

In respect whereof, the Lords decerned the said Mr. Andrew, charger, to be preferred to the sum consigned, (whereupon Mr. Thomas Hay de-

livered the same unto him,) he granting to the town of Couper a sufficient discharge thereof; which he did. Assoilyie the said town from the charge, and so suspend the letters *simpliciter*, as to the L.800 consigned. Find them orderly proceeded, so that they be put to farther execution for L.34, yet resting, aye and while the same be paid. Finally, discharge the whole remaining persons from troubling the said town for payment of the said sum of L.834; and that, in respect of their consent and discharge above-written.

Susp. Mr. David Balfour. *Alt.* Mr. George Norvell, Pat. Ranken, Mr. Robert Trotter, Ja. Cheap, Roger Hog.

Signet MS. No. 35, folio 11.

1663. *December* 12. ALEXANDER GIBSONE, HELEN FLEMING, &c. *against* SIR PATRICK MAXWELL, of Newark.

SIR PAT. MAXWELL, of Newark, by his bond *in anno* 1649, grants him to have borrowed and received from Elisabeth Fleming, relict of Malcolm Fleming, merchant burgess in Edenburgh, 12000 merks; and binds and obliges him to repay the same to her, for the use and behoof of her four daughters, Elizab. Helen, Janet, and Agnes Flemings, as their tutrix, each of them their proportional share of 3000 merks. Elizabeth, the mother, marries Sir Jo. Gibsone, elder of Pentland. Helen, one of her daughters, marries his son, Mr. Alexander Gibsone. Elizabeth is married to Robert Baird, and Agnes to Dr. David Hay. Mr. Alexander Gibsone charges Newark to make payment to him of the sum of 3000 merks, as the equal part of the said principal sum falling to his spouse. He suspends, on this reason, that there was a transaction betwixt William, Lord Cochran, and the suspender, whereby Cochran did engage to satisfy the said principal sum, and the whole byrun annuals thereof: according to which agreement, he paid Bailie Baird and Dr. Hay, whatsoever they could claim by their said wives; as their discharges thereof produced will verify. Mr. Alexander Gibsone he also pays: only in his discharge he acknowledges the receipt of 3110 merks, in part of payment of his wife's proportion; but prejudice to him to crave what further, after count and reckoning, should be found to him to be due. Whereupon, the suspender intented action, both against Cochran and Mr. Alexander, of count and reckoning, to the effect he might have known if any thing was yet resting of the said principal sum, yea or not: and, therefore, this being depending; till such time it be put to a close, all execution at Mr. Alexander's instance ought to be superseded. At the calling of this suspension, Mr. Alexander, by his procurator, gave in a declared charge, declaring that of the whole 3000 merks charged for, he finds now only L.440 resting owing, and all the rest to be satisfied, so that he restricts his charge to the said L.440. It being alleged by the suspender's advocate that he behoved to count and reckon, it was answered, that no count and reckoning could be granted, seeing the charge is liquid, unless the suspender would allege payment of the sums charged for; which payment in a suspension must be verified *instanter*, either by a discharge *vel juramento* of the charger.

REPLIED for the suspender,—That the said answer ought to be repelled, because Mr. Alexander, in his discharge, offers to count. My Lord Cochran's procurator declares he refused to count. All which being considered by the Lords, they suspended *simpliciter* the letters for the whole sums charged for, except allenarly the said L.440 given up in the declared charge, for which they find the letters orderly proceeded, and ordain them to have further execution, aye and while the same be paid.

Susp. Mr. William Maxwell. *Alt.* Mr. George Mackeinzie, Lord Cochran, Sir Thomas Wallace.

Signet MS. No. 36, folio 11.

1663. *December* 16. HUGH WEIR *against* THOMAS GRAY.

In July, 1593, there is a contract of alienation made betwixt William Levinstone, of Jerreswood, as patron to the chaplainry of Lady Alverage, lying within the Kirk of the town of Lanerk, called St. Nicolas' Chapel, with consent of Jo. Levinstone, incumbent chaplain at the time; and Ja. Gray, notary, burgess of Lanerk; whereby the said William dispones the said chaplainry, with the houses and barn-yard adjacent thereto, as also the acre of land called the Lady acre, with half an acre called the Bonnet or Typpett, to the said Ja. to be holden of him as superior for payment of 40s. Scots money, in name of feu-farm, being the retoured duty thereof, yearly. Sir William Lockhart, of Carstares, he acquires the superiority of the said lands, and dispones it to Jo. Hushillwood, Baillie of Lanerk. Ja. Gray, the vassal, dies, *in anno* 1643; whereupon the tenement falls in non-entry in Hushillwood, as superior, his hands. He assigns it to one Hugh Weir, maltman there: who, as donator, and by virtue of the gift and disposition made to him, raises a summons of declarator against Mr. Thomas Gray, writer in Edinburgh, oy to the said Ja. Gray; to hear and see it found and declared by the Lords, that the said tenements in Lanerk have been in non-entry since 1643, and are, and will be still in all time coming, aye and while the lawful entry of an heir of perfect age: *Item*, to see it declared that the whole farms, mails, profits, and duties of the said lands, have appertained, for the whole space foresaid, to the said superior, John Hushillwood, and, consequently, to this pursuer as his donatar: *item*, that they will appertain to them in all time coming, aye and while the lawful entry, &c. with the relief of the same, when it shall happen; the retoured duty, owing for twenty years together, amounting to L.40: *Item*, the farms of the said lands being set at their true avail, will extend to L.48 yearly; as a testificate, declaration, or acknowledgment of the defenders, produced by the pursuer, bears: *item*, to hear it found and declared, that seeing this pursuer has good and undoubted right to call for the mails and duties of the said lands, for all the time they have been in non-entry; *item*, for the feu farm thereof; that messengers at arms be directed to poind, apprise, and distrenyie the readiest goods and gear that shall be found upon the ground of the said lands, for the said mails and duties owing; and failyieing of moveable goods and gear streinyable, to apprise the ground-right and

property thereof, to the said pursuer, as donatar, aye and while he be made completely paid.

The Lords, upon sight of the letters of gift and disposition, decerned conform to the desire of the summons; by reason, especially, that the defender, compearing by his procurator, consented thereto.

Act. Sir George Lochart. *Alt.* Mr. Jo. Harper.

Signet MS. No. 37, folio 11.

1663. *December* 16. JAMES HEWAT *against* JOHN HEPBURNE of Waughton.

JO. HEPBURNE of Waughton, *in anno* 1662, obtains a decreet of removing, before the Earl of Hume, Sheriff of Berwick, against James Hewat, in Auldcambus, to flit and remove him and his from the four acres of lands, with one horse's grass, in the mains of Auldcambus; as also from the lands of Reidcleuches, parts and pertinents thereof, lying within the sheriffdom of Berwick. Upon this decreet, he purchases the Sheriff's precept, charging him to remove within such a space, else to incur the hazard of horning and ejection. This precept he suspends; then raises reduction of the decreet. The reasons he suspends upon, are, 1*mo*, it is for null defence and not compearance, not being cited thereto; whereas, if he had been cited, he had compeared and alleged such relevant reasons as would have stopped the giving forth of the said decreet, *in prima instantia*, which he now propones against it *in secunda*: as that he could noway be decerned to remove from the said lands, because he and his predecessors have bruiked the same past memory of man, by virtue of rights and tacks from the Earls of Home, Waughton his authors; and, particularly, that he possesses, by virtue of a tack granted him by James, Earl of Home, *in anno* 1640, during his lifetime; at least, for years yet to run and unexpired; long before the disposition or alienation of the said lands made to Waughton; and, therefore, till such time that the foresaid tack expire the suspender cannot be decerned to flit: 2*do*, *Esto*, the said tack were not valid, (as it is most valid,) yet considering how he and his said predecessors have bruiked the said lands, by virtue of the said rights, they cannot be removed therefrom till such [time] as their rights be reduced; which is not, nor cannot be done. At the calling of this suspension to the preceding reasons, the suspender's procurator added [and] eiked the following:—1*mo*, The said decreet is for null defence; for albeit therein, there is a procurator made compearing for the suspender, yet the truth is, he had no warrant from him to compear; whereas, it is notour that no procurator before an inferior judge should compear without a warrant in writ. 2*do*, The said decreet is given *a non habente potestatem*; one that could not be judge thereto, because in very truth, both judge and party in the cause, or at least, could either tyne or win therein: for, the Earl of Home (giver of this decreet) having sold (disponed) the lands, from which the suspender is decerned to remove, to Waughton, with absolute warrandice from all tacks, &c. if the Earl had assoilyied the suspender from the action of removing pursued against him by Waughton, upon consideration of this tack, he did forsee that Waughton would have pursued him for war-

randice of the said disposition ; and so he might have tint thereby. And for this cause, *de facto*, did he repel that unanswerable exception, grounded on the tack, contrary to all law and reason, and contrary to the daily practique of the Lords in such cases. And as the said reason would have been a good cause of advocation, so also must it be of suspension ; and, therefore, the decreet, as null in itself, must be turned in a libel. *3tio*, Albeit the said decreet had been given by a competent and unconcerned judge, (as it was not,) yet it ought to be suspended, both upon iniquity, and as null in itself, and wanting lawful probation, in so far as the foresaid unanswerable defence was repelled : for although it was answered, that he and his predecessors had passed from this tack, by their payment of a greater tack-duty than was contained therein, which was no sufficient nor relevant reply to take away the said tack, but the most it would infer is, the heightening of the duty ; *2do*, This cannot be proponed against the suspender ; seeing his father died only in April last, and he was warned to flit at Pasche, so that the term of payment not being yet come, he has not paid any mails or duties ; and, therefore, the said decreet is null, not proceeding on any probation. *4to*, It is to be remembered that the suspender has reduction of the said decreet, upon reasons coincident with thir, depending.

To all which it was answered by Waughton's procurators, that the letters at his instance against the said Hewat ought to be found orderly proceeded, and he assoilyied from the said summons of reduction intented against him; because the self same reasons insisted upon now, in the suspension and reduction, were all proponed before the obtaining of the said decreet, and repelled.

All which allegeances being well and ripely considered by the Lords, they found that reason of suspension relevant, that there was a tack of the said lands standing in the person of the said Ja. Hewat, suspender, granted by the said Earl of Home to him, before any right made by the said Earl to Waughton, for years yet to run, unexpired ; and, therefore, assigned a day for proving the same. Which they failyieing to do, the term was circumduced against the defender ; and decreet given forth, ordaining him to remove, otherwise the letters of horning to be put to farther execution against him. *Item*, assoilyie Waughton *simpliciter* from the action of reduction intented against him.

Act. Mr. Jo. Eleis. *Alt. charger*, Mr. David Dunmuire.

Signet MS. No. 38, *folio* 12.

1663. *December* 16. WILLIAM BAXTER and WILLIAM BLAIKWOOD *against* ANDREW LAMB of Southcarrie.

MR. ANDREW LAMB, Bishop of Galloway, at London, in November, 1623, borrows from William Kilmennie, merchant, residenter at London, 500 merks Scots; and because it was by Patrick Baxter, merchant-burgess and bailie in Edinburgh, his order, he got it, he grants him his bond of the same. In 1646, Patrick Baxter dies, and his son, William Baxter, serves and retours himself heir to his father; then charges Andrew Lamb of Southcarrie, oy and apparent heir to the said Andrew, Bishop of Galloway, granter of the bond, to enter heir to his fa-

ther and grandfather, within forty days, &c.; then pursues him, *in anno* 1658, as lawfully charged to enter heir, to hear and see decreet given against him, decerning him to make payment of the said sum to the pursuer. Compears Mr. Andrew Gilmor, as procurator for the pursuer, and declares, that he insists against the said [defender,] as lawfully charged to enter heir to his goodsire and father; and that, *pro loco et tempore*, he passes from the remaining passive titles libelled; as successor *titulo lucrativo post*, &c. as executor, as behaving as heir, &c.; and for instructing the summons, produces William Baxter's service to his father; then the bond; then the letters of general charge.

Compears Mr. Peter Wedderburne, as procurator for the defender, and ALLEGES, he cannot be convened as lawfully charged to enter heir; because he was content to renounce to be heir to them, with all benefit that might accresce to him thereby, in favours of the pursuer. Which exception the commissioners for administration of justice finding relevant, they assign him a day to produce a valid renunciation in favours of the pursuer; or with certification, that if he failyied, the term should be circumduced against him, and decreet given conform to the desire of the summons. At the term assigned, Mr. Peter produces a renunciation subscribed by the said Andrew Lamb. It was objected, that it could not be respected as valid, because not subscribed by his curators, he being a minor. For which reason the said commissioners finding it not valid, they circumduced the term, and gave out a decreet in favours of the pursuer. Conform to this decreet, in 1662, William Baxter, and William Blaikwood, as assignees constituted thereto by the said W. Baxter, charge the said Andrew Lamb of Southcarrie, to pay the debt contained in the said decreet. This charge he suspends, on this reason, that he has consigned in Sir William Bruce, clerk to the bills, his hand, a sufficient and valid renunciation, subscribed by him and his curators; in respect whereof, no execution can follow on that pretended decreet. *2do*, To show how ready and willing he is to procure to the said chargers, payment of their said debt, he has obtained a declaration under Jo. Ouchterlonie of Guind, his hand, declaring, That though he has decreet of adjudication of the lands of Southcarrie, for sums addebted to him; and that the said William Baxter has not done diligence against the lands of Southcarrie, by craving adjudication of the same, within year and day of his adjudication, as is prescribed by the act of parliament betwixt debtor and creditor; yet he is content to take him *pari passu* with him, effeiring to his sum. It is subscribed by two witnesses. Which two reasons of suspension, to wit, the renunciation produced, with the said Ouchterlonie's declaration, the Lords having well considered, they turn the decreet *in anno* 1658 in a libel, and assoilyie the said Andrew Lamb (upon the protestation of his procurators to that effect) from the haill points and articles thereof. Yet decern him to obey the said letters (upon protestation of the pursuers' procurators to that effect) *cognitionis causa tantum*; to the effect, the chargers may have action and process against *hereditatem jacentem et bona mobilia*, and whatsoever other goods and gear would have appertained to the said suspender, in case he had not renounced to have been heir. *Item*, Ordain the said Ouchterlonie to take in thir chargers with him *pari passu*, conform to his declaration. *Item*, Reserve to the suspender, his action of reduction, in so far as they have sustained the letters against him.

And whereas it was ALLEGED by the charger's advocate, that to produce a

valid renunciation now, was not time, seeing *res non erat amplius integra*, by reason of decreets recovered against the suspender: it was duplied, that they opponed the former reason of suspension; and that the charger, by their consent, should have all real execution he pleased.

Susp. Sir Geo. Lockart, Mr. George Mackeinzie. *Alt.* Mr. Rodger Hog.

Signet MS. No. 89, folio 13.

1663. *December* 16. ALEXANDER ANDERSON *against* JO. CHALMER of Collonach, and JO. CHALMERS, Minister at Gairtley.

ALEXANDER COLLIE, sometime in Langmuire, now in Scaitmuir, by his bond, obliges him to pay to Patrick Ferguson, burgess in Aberdein, the sum of L.53 yearly, for the years 1627, 1628, for his own entertainment; *item*, forty merks for his son's entertainment in 29, 30, 31, 32, 33, 34, &c. On this registrate bond, Patrick charges him, *in anno* 1656, with letters of horning. After, he is orderly denounced rebel, and lies year and day at the horn, unrelaxed; whereby, conform to the laws and practique of this realm, and privilege of the crown, his liferent-escheat fell in the king's hands, and became in his gift and disposition: who, by a letter of gift under the privy seal, disponed the same to Captain William Barclay of Auchvedy: who immediately intents summons of declarator of the escheat, against the said Alexander Collie; summoning him to compear, and hear it found and declared by the Lords, that he was orderly denounced; that he lay year and day under the said process of horning; that therethrough, all his goods, escheatable, as well moveable as immoveable, that pertained to him, the time of the said denunciation, or that accresced to him since syne, with the liferent escheat of all his lands, heritages, &c. were at the king's gift, and so do appertain to the said pursuer as donatar.

The Lords decerned, conform to the desire of the summons. This letter of gift, with the decreet of declarator thereupon, the said Captain assigns to Mr. Alexander Anderson, servitor to Sir Jo. Fletcher, king's advocate; who understanding that Mr. Jo. Chalmer of Collonach, as principal, and Mr. Jo. Chalmers, minister at Gairtley, as cautioner, had granted them to have borrowed from the said Alexander Collie, 1000 merks, and obliged themselves to the repayment thereof; he, by virtue of his assignation to the foresaid gift and decreet of declarator, having good and undoubted right to call for all debts or sums of money owing to the party denounced, pursues the said Collonach, principal, and Mr. William Chalmers, as son and heir, at least executor confirmed, to the deceased Mr. Jo. minister at Gairtley, for payment making of the said 1000 merks to him. For instructing the points of the forementioned summons, there is produced by the pursuer, the king's gift, with the decreet of declarator; then his assignation he has thereto; then a decreet of suspension purchased by the said Collie, against the said Chambers, finding the letters orderly proceeded against them, and ordaining them to have effect, ay and while the suspenders should make [payment] of the sum of 800 merks, which the Lords found really to be due, assoilyieing them from

the other 200 merks charged for; upon production whereof, the pursuer declared that he was likewise content to restrict his summons to the 800 merks specified in the said decreet of suspension. And for proving the passive titles against Mr. William Chalmers, he produced the extract of his father's testament, duly confirmed by the Commissary of Murray, decerning also the said Mr. William executor to his father.

ALLEGED by the defenders' procurators, that no process could be granted against them at this pursuer's instance, because in May 1659, there was a condescendance and minute made betwixt the said defenders and Collie, by which they were obliged to infeft him in an annualrent effeiring to the sum of 800 merks, contained in the decreet of suspension, out of the lands of Ashogle: by which destination the sum was made heritable; and so could not fall under escheat, and consequently, neither pertain to this donatar nor his cedent. Whereunto it was replied by the pursuer's procurator, that the allegeance ought to be repelled, because there was no such condescendance produced; likeas, although the same had been produced, yet could it not have been respected, because if any condescendance was betwixt thir defenders and the rebels, the same was long after the rebellion, he being rebel in 1656, and the condescendence being in 1659; and, therefore, done in defraud of the fisk; and so could neither prejudge the king's donatar, nor the donatar's assignee.

The Lords repelled the allegeance, in respect of the reply, and decerned the defenders to make payment to the pursuer of 800 merks; assoilyie them as to the 200.

Act. James Abernethy. *Alt.* Thoires.

Signet MS. No. 41, *folio* 14.

1663. *December* 16. CHRISTIAN LEVINSTONE, Viscountess of Oxenford, *against* ROBERT, Viscount of Oxenford.

THERE is a contract of marriage passed betwixt Sir James M'Gill of Cranston-Riddell, Knight Baronet, one of his Majesty's Senators of the College of Justice, and Christian Levinston, second lawful daughter to William Levinstone of Kilsith, procreated betwixt him and Margaret Ramsay, his spouse. In this contract my Lord Oxenford (afterwards so,) binds and obliges him to infeft his future spouse, in her pure virginity, before the completing of the said marriage by charter and seasing, *titulo oneroso*, in an annualrent of 2400 merks, to be uplifted by her, during her lifetime, out of the lands of Pentcaitland; which is declared to be to her in contentation and satisfaction of all terce and third that she might crave, suit, or claim of any lands, heritages, mills, &c. pertaining to him the time of his decease. My Lord Oxenford dies in May, 1663. In his testament he nominates his son his sole and universal legatar and executor; nominates Sir Ja. Richison of Smeton, David M'Gill of Rankelhor, Sir Ja. M'Gill fiar thereof, and Mr. Ja. M'Gill, minister at Largo, tutors. The Viscountess has eight or ten weeks to go of a posthumous child after my Lord his decease. She, upon her bond, from the tutors, obtains L.30 sterling, for de-

fraying some necessary charges of the family. Then Robert, son and heir, retours himself heir to his father. After which, she immediately intents action against him and his curators (tutors) for their interest; making mention, that where, by the law of the kingdom, she has good and undoubted right to the third of all her husband's moveables at the time of his decease, the inventory whereof, according to his confirmed testament, amounts to L.65,181 of free gear, debts deduced; the just third (and so her part,) whereof is L.21,730, 7s. 6d. *Item*, that where by the common law and the laws and practique of this realm, conceived in favours of ladies liferenters, that whatsoever expense or charge the said ladies shall be at from the decease of their husbands, on themselves, families, children, or servants, till such time as they shall be put in the actual and real possession of the conjunct fee lands provided to them in liferent by their husbands, that the same shall be refunded, satisfied, and paid to the said ladies, by the heirs and executors of their husbands, according to the condition and quality of their persons, at the sight and modification of the Lords: But so it is, that the said pursuer has been at all these expenses since her husband's decease, which was in May last, which she cannot value to less than 4000 merks, especially considering her lying-in during the said space: *item*, for maintaining George, Mary, and Margaret M'Gills, her children, during the said space; whose entertainment and maintenance Robert, Lord Oxenford, by a bond of provision granted in their favours, obliged him to defray till their age of seven years; she craves, therefore, 1400 merks as a reasonable allowance for the same. She summons him, therefore, and his curators, to hear and see it decerned that the third of the whole moveables belong to her; *item*, to make payment of the same to her; *item*, to refund her charges expended on her family since her husband's decease, &c. For instructing the summons, her procurators produce an extract of her son's retour and service to his father; then a faithful inventory, (made by the deceased himself,) of her husband's goods and gear owing to him and by him; then the confirmed testament, wherein her son is only executor nominated. For the defender, there is produced his father's contract of marriage, before deduced.

All which being well and ripely considered by the Lords, they decerned Robert, Viscount of Oxenford, to make payment, to his mother, pursuer, of the sum of 3000 merks, as their modification of what she craved, for the expenses bestowed by her on the family, from the time of her husband's decease till Whitsunday last; as also for her charges debursed during the time of her lying-in of the said posthumous child; and this by and attour all provisions that were in the lodging, the time of her husband's decease. With this *proviso* always, that in the first end of the said 3000 merks, she shall allow the L.30 Sterling borrowed by her from her son's tutors; they redelivering her her bond thereof, to be cancelled by her, or otherwise used at her pleasure. *Item*, Decern and ordain him and his tutors to content and pay to his mother 300 merks, modified by them, for entertainment already given by her, during the said space, to his brother Robert. *Item*, 400 merks, for the maintenance furnished by her to his two sisters. And thus the Lords decerned: albeit it was alleged, the time of the dispute, by the defender's procurators, that there could be no process sustained, at the said pursuer's instance against the defender and his tutors, for aliment of the family, because, 1*mo*, The said pursuer was abundantly provided; 2*do*, No aliment can be allowed for sixteen servants,

(as she libels there were,) because the said defunct died twenty days before Whitsunday, and so the lady might easily have dismissed her servants; *3tio*, Offers to prove that the house was furnished, the time of his death, with all necessaries of malt, meal, and others. To which, replied, *1mo*, That the lady being so near her time of delivery, she could not dismiss her servants conveniently, till after the same. *2do*, Whatever provision was in the said house, the time of the defunct's death, it fell all under executry, so that she might not meddle therewith. And as to the third of moveables craved by her, (concerning which the Lords decerned nothing yet,) it's alleged by the pursuer's procurators that, by her contract of marriage, she has accepted a provision in lieu of all thirds or terces she might acclaim; and so was excluded from a third of the moveables; and craved to be heard thereon *in presentia*. Who having been heard thereupon, the Lords found that the pursuer was not excluded from a third of the moveables, by the said contract of marriage; and, therefore, ordain the said parties to count and reckon, one with another, concerning the said third of the moveables acclaimed by her: and for that effect, nominate my Lord Halkerton, one of their number, to be auditor of the said counts, giving him full power and commission to choose a clerk, for whom he will be answerable therein; *Item*, to hear all said and proponed *hinc inde*; to examine witnesses, to see what sums of money pertained to the defunct, the time of his death, that she may have a third thereof; to direct forth precepts for summoning of them; to settle and agree the said parties if he can; if not, to report his diligence in February coming: and to this effect, they are ordained to attend at what diets he shall appoint them; of all which they are to be warned *apud acta*.

Act. Mr. Robert Sinclair, Sir Thomas Wallace, Mr. Jo. Cunyghame. *Alt.* Sir George Lockart, Mr. Geo. Norvell, Mr. Geo. Mackeinzie.

Signet MS. No. 42, *folio* 14.

1663. *December* 17. The MINISTER and KIRK-SESSION of North-Berwick *against* SIR WILLIAM DICK'S Creditors.

MR. ARCHIBALD TURNER, minister at North-Berwick, obtains decreet *in anno* 1657, against the heritors, feuars, life-renters, and other parishioners of the lands of North-Berwick; by which decreet, a church is ordained to be built at the said town of North-Berwick; and the place where it and the kirk-yard thereof should be, are also designed: to which effect they ordain the said lands and ground destined for that use, to be valued, rated, estimated, and approven by some indifferent persons appointed by the said commissioners for that effect, granting them commission for that effect; then ordain the heritors and proprietors of the said ground, designed for the said end, to denude themselves in the most effectual way that can be of the law, in favour of the rest of the heritors and parish of North-Berwick, and their successors: *item*, decern them, on their denuding themselves, to accept such prices as the commissioners appointed shall value their land at, to be paid them by the present heritors of the said parish, or those to come. *Item*, ordain the heritors foresaid, to convene themselves at such certain

times and places, under the pain of horning, to choose stent-masters for the stenting of the parish, for the ends and uses foresaid. *Item*, For ingathering thereof, ordain that what stent-rolls shall be made by the heritors convening, that they be as sufficient as if the same had been by the whole heritors present, and consenting: *item*, Ordain them to make quiet payment of their proportions contained in the said stent-rolls. Upon this decreet, letters of horning are raised in *anno* 1661: and an act of the kirk session of North-Berwick in 1662, bearing, that some of the heritors, upon intimation made to them, compeared, for considering how the work might be perfected; and some absented themselves: that those that were present found by advice with craftsmen, that the said new kirk would need 4000 slates more, which would be 200 merks; for nails to the slating, forty merks; for thirty-six cartful of lime, at thirty shillings the cartful, eighty-one merks; for 400 feet of glass, at five shillings the foot, 120 merks; for nine windows, 120 merks; for six stones of iron, for glass bands, twenty-four merks; for twelve deals to be doors, for bell nails to them, for bands and locks to them, sixty merks; for a pulpit of wainscot, 100 merks, &c. all which, cast together, makes 1162 merks: and appoints Robert Acheson of Sydserf, and Patrick Hepburne of Craig, to cast the proportions on the heritors, according to the rule of assessments, that it might be furthwith collected: *item*, Appoints others to agree the cheapest they can with craftsmen, about the forementioned particulars. According to this act of kirk-session, the said heritors appointed, did give in a stent-roll made by them, whereby the lands sometime belonging to Sir William, and now to his creditors, were stented to L.256. Upon all which, the kirk-session, and Mr. Archibald Turner, minister there, charge Sir Ja. Stewart of Kirkfield, the provost, (it is a part of Camusbusnethen lands, that once belonged to my Lord Somervaill, called Cowdailie,) and the remainant creditors of Sir William Dick, for the said sum of L.256, as the proportion of the stent-money payable out of the lands and abbey of North-Berwick, which sometime pertained to Sir William Dick; and that conform to the stent-roll cast upon the parish, conform to an act of their kirk-session; which act proceeded on a decreet obtained by them against the heritors, in *anno* 1657. This charge, Sir Ja. for himself, and in name of the rest of the creditors, suspends: 1*mo*, Because the letters are general, founded on no decreet, bond, or other warrantable ground; as the very copy of the charge delivered to the suspenders, not condescending on any decreet or other ground whereon the said letters were founded, proves. As for their pretended decreet, obtained before the usurpers in *anno* 1657, they purposely suppress it, because, by act of parliament, all the lieges are allowed to quarrel these decreets, and that summarily by way of review, without necessity of reduction: *item*, Provided that whenever persons be charged on such decreets, that suspension shall always be granted upon caution: *item*, considering how much they have already exacted for that use: *item*, the arbitrary illegal way they have of exacting the same, the said letters ought to be suspended. 2*do*, The suspenders, upon a former charge, paid L.360 to this use; and at the payment of it, the stent-masters collectors, now chargers, faithfully promised to demand no further of them for perfecting the said church; in respect of which promise the letters ought to be suspended. 3*tio*, The suspenders are not heritors of the said lands of North-Berwick, but only creditors, and so countable for their intromis-

sion; as even now, *de facto*, there is a process of count and reckoning depending at the instance of Sir William Dick's other creditors, against this suspender, wherein they refuse to allow him the sum of money already paid out by him, for building of the said church: and, therefore, till such time as the Lords determine in that, the suspender can neither be *in tuto*, nor *in bona fide*, to obey this charge, but behoved to suspend the same. *4to*, The very decreet charged upon in 1657, ordains, that there should be a previous charge directed against the whole heritors of the parish, to meet and convene and stent themselves; but so it is, there was no previous charge before this stent; *ergo*, till such time there be a previous charge, the letters ought to be suspended *simpliciter*. *5to*, *In anno* 1653, the chargers did take a great girnel-house from the suspenders, to preach in till the kirk were built, for which they promised to pay yearly L.40 of tack-duty, (which girnel they have ever kept since,) and therefore craves compensation thereof with this stent. At the calling of this suspension, either party declared that they would hold the copy of the suspension for a principal. To the L.360 alleged paid,

ANSWERED,—Ought to be repelled, because not instantly verified. As to the girnel-house, no compensation, *quia non inter easdem personas*; for it was the heritors that became obliged for the said tack-duty, and not the kirk-session, who charge now. As to that which is said of a previous charge, none is necessary, because the suspender compeared voluntarily by his chamberlain, Ja. Sandilands, and consented to the stent, as appears by the stent-rolls.

All which being considered by the Lords, they found the letters orderly proceeded, notwithstanding the reasons of suspension; and therefore ordained them to be put to further execution, ay and while the suspender made [payment] of the sum charged for, to Mr. William Walker, now minister there, and the kirk-session thereof.

Suspender, Ja. Stewart. *Alt.* ———

Signet MS. No. 43, *folio* 15.

1664. *January* 7. CHRISTIAN RAMSAY and JO. HAMILTON, her Husband, *against* GEORGE, LORD RAMSAY.

GEORGE, LORD RAMSAY, in December 1661, grants bond to Christian Ramsay, daughter to Mr. Simeon Ramsay of Whitehill, for 3500 merks, with L. 300 of expenses, and L.10 of penalty in case of failyie. This bond she registers in 1662; and with consent of Jo. Hamilton, saddler, burgess in Edinburgh, her husband, for his interest, charges him to make payment of the same. This charge he suspends; because, 1*mo*, albeit the said bond bear dated in 1661, yet the debt therein contained is an old debt, due by the suspender to the charger, conform to a bond long before the act of debtor and creditor; which, at persuasion of Mr. James, now Sir James Ramsay, and Mr. George, advocate, her brother, he renewed to her; and so the defender having taken the benefit of the said act of debtor and creditor, as is notoriously known to the clerk of the bill, no execution can

pass against the suspender on this bond; and therefore ought to be suspended. *2do*, The very bond charged on, bears an express clause, that it shall not be lawful for the charger to uplift the said money, without the special advice and consent of her said two brothers: she accepted the said bond under that condition. But so it is, they have not consented to the said charge, but, on the contrary, have assisted the suspender in procuring this suspension of the said charge; and that in respect they are afraid that she and her said husband will dilapidate the same; and therefore, &c. This suspension being called, the charger's procurators allege against the said second reason of suspension, as insisted on, that it ought to be repelled, because, *1mo*, The charger is married since the granting of the said bond, and has children and a family to maintain; and so in reason cannot be debarred by her brothers from uplifting the said money; especially seeing this clause is to their behoof, they being her nearest heirs. *Item*, Her husband may trade therewith. But, *2do*, for a peremptory answer thereto, there is produced a consent or declaration under her brothers' hands, whereby they declared that their intention in inserting of the said clause, was not to seclude their sister, now charger, from uplifting the same from the suspender, providing she should secure it in some other manner of way, best tending to her advantage, and not dilapidate the same: *item*, Declared, that if she should take any preposterous course therewith, or sinisterously employ the same, that then this their consent should be null. To which it was replied by the suspender, *1mo*, That he opponed the clause in the bond, whereby it was provided, that no time during her lifetime, (*ergo nihil refert*, as to suspender, whether she be married or unmarried,) she shall uplift the same, without the consent foresaid. *2do*, As to the declaration, it is replied, that the same is no positive consent; but allenarly their intention of inserting the said clause. *3to*, It bears a clause irritant, *videlicet*, that if she take any preposterous course to her prejudice, that then the same shall be null. Whereto it was duplied for the charger, that she opponed the foresaid declaration; and as to the clause irritant, it says nothing, unless the suspender were able to subsume, (which he is not,) that she has taken any such dishonourable course. In respect whereof, the letters ought to be found orderly proceeded.

All which the Lords having considered, they find the letters orderly proceeded, and decern the suspender to pay to the charger the said 3500 merks. *Item*, Suspend the letters simpliciter as to the 300 merks of expenses, and L.10 of failyie.

Charger, Mr. Thomas Baird. *Alt.* Mr. Thomas Lermonth.

Signet MS. No. 57, *folio* 18.

1664. *July* 12. ISOBELL NICOLL and JAMES INNES, her Husband, *against* THOMAS BLAIR and SIR THOMAS WALLACE of Craigie, Advocate.

THOMAS BLAIR, merchant in Edinburgh, by his bond obliges him to content and pay to Andrew Nicoll, burgess there, the sum of L.27, 11s. Sterling money, in 1662. Sir Thomas Wallace of Cragie, advocate, by his [bond,] obliges him

to cause the said Thomas end counts with the said Andrew Nicoll, and that under the pain of L.8 Sterling. Andrew dies. His relict, Isobell Nicoll, confirms his testament, and gets her nominated to him executor dative, and that by being surrogated in the place of the commissary fiscal of the commissariot of Edenburgh; *item*, gets licence to pursue for her deceased husband's debts. Whereupon, with consent of James Innes, writer in Edenburgh, her spouse, she registrates the said two bonds; obtains decreet thereon before the Lords; and on this decreet raises letters; and then charges with horning: which they suspend, 1*mo*, Because the said decreet is for null defence; for if they had been cited thereto, then the said [Thomas] Blair would have alleged, as [he] does now, that the said decreet could not be pronounced; because the said L.27 ought to be compensed in the first end of 4000 merks owing by the charger to the pursuer, at least to his pupil, to whom he was nominated curator *sine quo non;* for whom he had advanced and disbursed considerable sums of money on aliment and education, and so had good right to the said 4000 merks; so that he has intented action, for payment making thereof to him against this charger, as intromitter with her husband's goods, even now depending before the Lords of Council and Session: and therefore, till that process be discussed, thir letters ought to be suspended; especially seeing he is willing to compense the said sum of L.27 with the said 4000 merks. And as to Sir Thomas Wallace, 1*mo*, It is strange how this decreet could pass against him, seeing he, being a member of Court, and constantly attending on the house, the said decreet (if any such had been) could not have escaped him. But, 2*do*, He has an unanswerable defence, to wit, that his ticket is alternative, obliging him either to make the said Thomas Blair end counts with the said Andrew Nicoll; or otherwise to re-deliver him a bond, (deposited then in his hands,) for the said L.8, granted by the said Thomas to him, that he might thereupon suit execution; but there is no clause in the said ticket that can on any ways be construed obligatory on the said Sir Thomas to pay the said L.8 himself. But so it is, that by warrant from Andrew Nicoll, he delivered the said bond to Thomas Blair, granter thereof.

At the calling of the suspension, of consent of parties, the copy of the suspension is holden for the principal. The charger's procurators declare, that they passed from Sir Thomas Wallace; and that they charged him with, and insisted only against, the said Thomas Blair. For instructing the summons against him, there is produced the extract of the said decreet alleged obtained, with the letters of horning raised thereupon.

Against the reason of suspension, it was ALLEGED for the charger,—That compensation was not in this case receivable; yea, that to allege or crave the same was both absurd and irrelevant, seeing there was a decreet of the Lords produced; whereupon, according to the law of Scotland, there was *parata executio*, by act of Parliament in King James VI. his time, Parl. 12. act. 141. whereby it is appointed, that no compensation be received after sentence, except the debt were both liquid, and could be instantly verified.

To the which it was DUPLIED for the suspender,—That the act of Parliament extended only to decreets given in *foro contentioso*. *Item*, that there was a process intented [at] the suspender's instance, in his own name, and in behalf of his pupil, for the recovery of the said 4000 merks, wherein all the instructions of compensation are produced.

Whereto it was TRIPLIED for the charger,—That the act of Parliament was general, of all decreets; and that by the undeniable practice of Scotland, the said act doth militate against such as are contumaciously absent; otherwise it were to no purpose to obtain sentence, *et contumaces lucrarentur ex suo dolo.* *2do,* It were against all reason, that upon raising or intenting of a process, (which is in every man's power,) execution of sentences or decreets should be stopped after they are pronounced by the Lords of Session; and especially when the defender has many just defences against the pursuit intented against him; and when the pursuit is only raised at the instance of the suspender's pupil after obtaining of the decreet whereupon this charge, by him suspended, is founded; by the which it evidently appears that the same is only raised, *dolo malo et animo protelandi litem.* And all that could be now craved was, that action might be reserved, at the instance of the said pupil, as accorded of the law. *3tio,* Neither in this suspension, nor in the said process, are there any [writs] produced to instruct the said suspender's title as assignee, or having right from the said minor; so that, albeit decreet were obtained at the said minor's instance, for the said sum of 4000 merks, against the charger, (as is not,) yet it were against all law, equity, and reason, that the curator should compense debts justly owing by himself, with debts owing to his pupil. *Igitur,* The letters ought to be found orderly proceeded.

The Lords repelled the reason of suspension, with the duply, in respect of the reply and triply made thereto; reserving always to the said Thomas Blair, suspender, action for the said 4000 merks, upon his pretended assignation thereto. In the mean while, find the letters orderly proceeded, ay and while the suspender pay to the charger the said L.27, 11s. Sterling, with the said L.8, also contained in Sir Thomas Wallace, his ticket.

Suspenders, Mr. Thomas Winziet, and Sir Thomas Wallace. *Alt.* Mr. George M'Keinzie.

Signet MS. No. 65, folio 20.

1664. *July* 12. THEODORE BEATON *against* ANNA MACMORRAN, Lady Newhall, ANNA MAXWELL, Old Lady Newhall, and CAMPBELL of Cesnock.

KING CHARLES the First, by his gift under his hand, at Whitehall, 1627 years, grants to Sir Ja. Scot of Rossie, all and haill the mailles and duties of the lands of Kingsbairnes, within the stewartry or sheriffdom of Fyfe, extending yearly to twenty chalder of victual, nine of wheat, and eleven bear; with L.48 of silver, and 100 capons; and that during his lifetime. Sir James, in 1631, assigns the said gift of pension to Doctor David Beaton, and Ester Gillen, his spouse; who obtain a ratification thereof from his Majesty, during Sir James, his lifetime. Doctor Beaton, in 1631, assigns the same to Edward Sedler of London, Esquire, and Mary Sayer, his spouse, and her assignees, during her lifetime. The said Mary dies in 1661; and nominates her daughter, Margaret Lauder, her executrix, as the testament confirmed in England bears. This Margaret Lauder, in 1663, assigns this pension to Theodore Beaton, son lawful to the said Doctor Beaton; at least

constitutes him her factor for uplifting the said annuity, for the years 1657, 1658, 1659, 1660, &c. as the factory dated in 1663, and registrate at St. Androis, bears. Theodore, upon this right constituted in his person, pursues Anna Macmorran, Lady Newhall, and Anna Maxwell, Old Lady Newhall, with ——— Campbell of Cesnock, her spouse, for his interest, to make payment to him, as assignee foresaid, of L.9 Sterling, of all the years preceding, as the fourth part of the said annuity, for which they are liable in payment. For instructing the summons, there is produced the king's gift; Rossie's assignation of the same, with the king's confirmation thereto; Doctor Beaton's assignation thereto to Sadler and his spouse; the confirmed testament of his spouse, wherein she nominates her daughter, Margaret Lauder, her executrix; then the said Margaret her assignation, or letter of factory to this pursuer. ALLEGED for the defenders, that no process can be sustained against them, till the debt be confirmed in Scotland; and that the defender ought to find caution. To which it was ANSWERED, that the allegeance ought to be repelled, because of the administration in England. *2do*, The pursuer cannot find caution, because he found caution already, in loosing the arrestment.

The Lords ordain the defenders to make payment to the pursuer, conform to his rights, titles, and securities aforesaid, of the said L.9 Sterling, for all the years respectively above written.

Act. Mr. William Beaton, Mr. Alexander Spotswood. *Alt.* Mr. Jo. Cunyghame.

Signet MS. No. 66, *fol.* 21.

1664. *January* 12. SIR GILBERT MEINZIES of Pitfoddells *against* The CREDITORS of JOHN DONALDSONE.

JOHN DONALDSONE, merchant-burgess in Aberdein, loans to Sir Gilbert Meinzies of Pitfoddells, and William Meinzies, fiar thereof, his son, *in anno* 1649, the sum of L.16,000. They for his repayment and better security of the same, sell, dispone, wadset, and annailyie to him, his heirs, and assignees, all the town and lands of Gilcomstone, with the lands and mill of Ardo, and the salmon-fishing thereof in the water of Dee; lying within the parishes of St. Machar and of Bouchrie Devewinck, and the sheriffdoms of Aberdein and Kincardin: *item*, they set him in tack the teind sheaves of the lands above written: and all this during the not redemption thereof; which are declared redeemable by the said Sir Gilbert and his foresaids, by payment or consignation of the foresaid sum of L.16000, on requisition specified in the contract of wadset. Conform to this contract, he is immediately, in 1649, infeft in all and whole the said lands. Then by virtue of a contract betwixt him and Andrew Raite in Mariecouller, as principal, and the said Sir Gilbert, as cautioner, the said John sets and assedates to the said Andrew Raite, his heirs, assignees, and subtenants, all and haill the lands above mentioned, wadset to him for five years to come; the entry of it to be at Whitsunday 1649; and that for the yearly payment to him of L.1040

of tack duty. After this, *in anno* 1652, the said John Donaldsone, by a declaration under his hand, relative to the two contracts above mentioned, declared, that (he now being bound for Camphire in Zealand,) though he had indeed a wadset on some of Pitfoddells' lands, redeemable for the sum of L.16,000; yet at that present instant, he found, after due counting, that there was only resting to him by Pitfoddells, the sum of L.15,245; so that he discharged Pitfoddells, and his son William, of the superplus of the said sum of L.15,245, for now, and for ever; howbeit the wadset bears the receipt of L.16,000 by the said Pitfoddells. *Item*, Declares that he had received from Andrew Raite, at Whitsunday 1651, L.800 in part of payment of his tack-duty for that year, whereof he discharged him for ever.

Jo. Donaldsone, by his bond, is indebted to George Cullen, merchant, and late Provost of Aberdeen, the sum of L.6000. *Item*, By contract of marriage betwixt Robert Ramsay, merchant there, and Bessy Donaldsone, his daughter, in 1650, he promises, in name of dot and tocher, 5000 merks to the said Robert, his son-in-law. For satisfaction of which two debts, he assigns the said George Cullen, and Robert Ramsay, his son-in-law, to as much of the said sum of L.15,245, (which he declared in the assignations to be the only sum addebted to him by Pitfoddells; albeit the contract of wadset betwixt them bore L.16,000,) as would pay them their respective debts above rehearsed; giving them also a letter of advice to the said Sir Gilbert, and in his absence to his son William, giving them full power, warrant, and order, to content and pay to the said his two assignees, their respective sums contained in their several bonds: *item*, To take up their said bonds, and to report their discharges as made to him; upon the sight whereof, he obliges him to allow to the said Sir Gilbert and his son, the said two sums paid out by them, in the first end of the L.15,245, due to him by the wadset foresaid; and declares that the said wadset lands shall be redeemable on payment of what shall be found remaining of the said principal sum of L.15,245, after he has obeyed the contents of this warrant. Thir assignations are duly intimated to Pitfoddells; who, conform thereto, pays to the said George Cullen and Robert Ramsay the said two sums of L.6000, and 5000 merks, by granting to each of them his own bond for the said respective sums, as for borrowed money; taking up their bonds that Jo. Donaldsone had granted them, together with a discharge of the same to and in favours of Donaldsone.

The same Jo. being also by his bond, addebted to Mr. Alexander Davidsone, advocate in Aberdein, the sum of 3500 merks; as also to Ja. Cumming, Chamberlain of Slaines, for the Earl of Erroll, by another bond, in the sum of 6000 merks; at this same time, in February, 1652, for their satisfaction, he grants them assignation to as much of the foresaid sum of L.15,245 he had in Pitfoddells' hands, as was yet resting unexhausted by the foresaid two assignations; with a letter of advice to Pitfoddells, beseeching him to obey the said two assignations, by making payment of the sums contained therein; with full power and commission, as was in the former warrant. Which assignations were also duly intimated. And Mr. Alex. Davidsone giving up his bond, with a sufficient discharge of the same, is paid, by getting a new bond of borrowed money, containing the sum of 3500 merks, from Pitfoddells. Ja. Cumyng choosing rather to have his by a decreet, he summons Pitfoddells before the late pretended Commissioners for, &c. to hear and see himself decerned to make payment to him of the said 6000 merks, contained in

the assignation. They, by their decreet, ordained him to pay the same, and that out of the said £15,245 addebted by him to John Donaldson. In obedience whereof, Pitfoddells grants him his bond for the said 6000 merks, [and] takes up John Donaldson's bond and assignation; together with a discharge, discharging the said John Donaldson of the said bond, and sums therein contained; as also discharging Pitfoddells of the decreet obtained against him, with all that had followed or might follow thereupon.

John Donaldson being also addebted to Alexander Galloway, merchant-burgess in Aberdeen, the sum of 4800 merks, (the 800 merks Alexander had right by assignation granted him by Jean Boaddie, relict of William Middleton, burgess in Aberdeen, who had a bond from John Donaldson for the same,) he assigns him also to what was resting in the said Pitfoddells' hands of the £15,245; to wit, to so much thereof as would completely pay him of the above-mentioned sums of 4800 merks; with warrant to the said Pitfoddells as formerly. This assignation is also intimated and obeyed in the same manner as the former.

By payment thus made (to wit, in granting them his own bonds for their respective sums,) by Pitfoddells to the forementioned assignees, that is, George Cullen, Robert Ramsay, Mr Alexander Davidson, James Cuming, and Alexander Galloway, the sum of £15,245, contained in the said contract of wadset, is almost all satisfied and paid by the said Sir Gilbert to the fore-mentioned creditors of John Donaldson, and that before the said John was disenabled, by any legal diligence led against him, in any way to dispose or assign the said sum contained in the foresaid contract of wadset, in whole or in part; yea, before there was so much as an arrestment or inhibition against him. Notwithstanding whereof, George Morison, late provost of Aberdein, Alexander Thomson, advocate there, George Summer, in Balnagask, Mr Alexander Skene, merchant in Aberdeen, William Innes of Tippertie, and his sons and brother, Andrew Rait, brother to the Laird of Halgreine, Janet Ramsay, Lady Wattertone, and others, all creditors of the said John Donaldson, hearing that he was bankrupt, and no more *solvendo*, led comprisings against the said John, comprising from him his wadset-right of the said lands of Gilcomston and Ardoe, redeemable on payment of L.15,245; as also his right to the back-tack duty contained in the second contract, in payment and satisfaction to them of their several sums of money; whereupon they obtain themselves infeft: they also arrest the said sum of L.15,245 in Pitfoddells' hands, to be made forthcoming to them, whom they also trouble in the peaceable enjoying and possessing of his lands, daily calling and pursuing for the maills and duties of the same, or else for the said sum of L. 15,245, whereupon they are redeemable. Whereupon Pitfoddells raises a summons of multiplepoinding, wherein he makes mention that he has made payment to some five of the lawful creditors of the said John Donaldson (who had rights and assignation thereto, made by the said John, all lawfully intimated to him,) of the said sum of L.15,245, except only L.1373; which sum the said Sir Gilbert was most willing to pay to any of the said John Donaldson's creditors that have comprised or arrested, who shall be found to have best right thereto. *Item*, He summons the said whole creditors, comprisers or arresters, with the forenamed whole creditors-assignees, as also John Donaldson, for his interest, to the effect it may be decerned which of them has best right to the said sum contained in the contract of wadset.

This action being often called, and long disputed, at last, in July 1656, the said Commissioners preferred the forenamed creditors-comprisers to the creditors-assignees as to their right of the said sum of L.15,245, for which the lands were wadset to John Donaldson; and therefore ordained the comprisers, only according to their respective rights, to be answered, obeyed, and paid of the said back-tack duty; as also of the foresaid sum wherein they were wadset. *Item*, They liberated Pitfoddells from the said creditors-assignees; and ordain them to grant sufficient discharges to the said Pitfoddells of whatever decreets they have obtained against him for the sums contained in the said wadset; with discharges of all bonds granted by him to them by reason of their assignations, if the bonds be registered; or then to redeliver the very bonds themselves, if not registered. *Item*, To refund him what annualrents he has already paid any of them since the dates of the said bonds. *Item*, Grants them to November next, 1656, to exhibit and refund as aforesaid; with certification, and they failyie, they should be holden as confessed.

Notwithstanding of this decreet, the said creditors-assignees, upon alleged iniquity thereof, postponed and delayed to obey the same; which Pitfoddels, suspecting that it might tend to his prejudice, he summoned them all again of new, in 1663, to hear and see themselves decerned to obey the said decreet, in 1656, in all the heads thereof; with certification, and they compeared not, they should never be heard, in time coming, to propone any objections in law against the said decreet pronounced in favours of Pitfoddells.

At the sametime, the creditors-assignees of the said John Donaldson, (George Cullen being dead, his three daughters, as heirs and executors to him, pursue; *item*, Alexander Galloway constitutes William Strauchan of Glenkindie, younger, assignee to his son,) raises a summons of review conform to, upon the 12th Act of the Parliament in 1661; and the Lords of Session their act of sederunt in pursuance thereof, wherein the said Pitfoddells and his son, the said creditors-comprisers; *item*, John Donaldson, for his interest,—are summoned to hear and see the said pretended decreet, in 1656, revised and recognosced by the said Lords; and such effectual course taken for restoring the said creditors-assignees against the said decreet, as if the same had never been pronounced, as the Lords shall think expedient; and that because the said Judges repelled most relevant and unanswerable defences alleged for the creditors-assignees, pursuers in this review: as, 1*mo*. That they ought to have been preferred to the comprisers, because they had used the first diligence against the said John Donaldson, in obtaining from him assignations of that money that was upon the wadset-right of Pitfoddells' lands, the said John being then in trust and credit, and not having so much as an arrestment or inhibition against him; whereas they did not comprise, &c. till the said John was bankrupt. 2*do*. It was farther urged, that *esto*, let the Judges find the comprisers to have better right to the said right of wadset, and sums wherein it is redeemable, than they; yet Pitfoddells must stand liable to them for their respective debts owing to them by John Donaldson; because, 1*mo*. Pitfoddells retired from them their bonds they had of the said John Donaldson; and, in lieu thereof, granted them his own proper bonds for borrowed money. 2*do*. The assignations granted to these pursuers by the said John, to the sum he had then lying on Pitfoddells' lands, were only in corroboration of their bonds they had of him before: yet Pitfoddells took from them discharges of the said bonds from their own proper facts and

deeds allenarly, as also took up their assignations; and so they accepted of Pitfoddells his bond for their only and full security, and denuded themselves of all action that might have been competent to them against John Donaldson, who then was in credit. Now, if Pitfoddells (who thus acquired right to all those actions against John Donaldson,) did not use timeous diligence for his relief, but was *in mora*, it must prejudge himself, and not the creditors-assignees, who, being denuded of all right of action against John Donaldson in favour of Pitfoddells, they were not able to use any diligence against him. Which defences the said Judges most unjustly repelled; and refused to hear the creditors-assignees, their procurators, debate some other things, and particularly anent the not registrament of renunciations mentioned in the dispute foresaid, but gave forth their decreet in manner above written. By this summons of review, therefore, they crave either to be preferred to the said comprisers as to the sums above mentioned; or else (if the said creditors should be preferred by the Lords,) that Pitfoddells may be decerned to pay them conform to his bonds granted by him to them.

This is the second action in this cause.

About this same time, 1663, Pitfoddells, upon his decreet obtained in 1656, charges Mr Alexander Donaldson and Robert Ramsay with horning, to obey the contents of the said decreet, by delivering to him again his bonds, or else discharges of the same, &c. as at more length contained in the decreet.

This charge they suspend; because, (1*mo.*) the same is altogether general, not condescending what bonds or what decreets the suspenders should discharge to the chargers; neither what annualrents they should repay: and therefore, till such time that Pitfoddells condescend in particular, they know not what obedience to give. 2*do.* The said charge is most wrongously given, seeing the suspenders claim no right, by decreets or otherwise, to the sums of money addebted to them, but only by Pitfoddells' own bonds, which he granted them in manner and on terms before deduced. 3*tio.* As to the decreet charged on, the same is null of the law; because several relevant defences proponed therein, till through the ignorance of the then English Judges, are repelled: *Item*, There is a summons of review of the same intented at the suspenders' instance; wherefore no charge can be sustained thereon till such time the said summons be determined. 4*to.* The very charger himself, finding the said decreet charged on very confused, has intented new summons of declarator, for his own liberation from the said bonds, against the suspenders, whereby he has clearly passed from the said decreet; and, therefore, no charge at his instance can be sustained thereon.

About this time, also, Pitfoddells, on his decreet 1656, (this is the fourth action in this cause,) charges James Cuming to obey the same, by exhibiting and producing to him the writs Pitfoddells had granted him.

This charge he suspends, 1*mo.* Because the same is general, groundless, and informal, not condescending on the grounds nor warrants thereof; as if it be a decreet, nor on the name of the court or judge where the same was obtained, nor on the bonds or other rights, nor on the matter of fact; for here is a charge ordaining him to discharge what decreets the suspender had obtained against the charger: *Item*, To deliver him back such bonds as the charger had granted to the suspender, neither condescending on the decreets, their dates or tenors, he craves to be discharged; nor on the bonds, their dates, nor the

quantity of the annualrent to be restored; nor upon any decreet decerning him to do the same. In respect whereof, the letters ought to be suspended, and the messenger, executor thereof, to be punished for his informality.

But, *2do.* Granting the said decreet were formal and special, as it is not, yet the said suspender cannot be obliged to grant to the charger a discharge of the said bond; because he offers him to prove, that when the suspender, in 1652, had obtained decreet against Pitfoddells, as John Donaldson's debtor, and, by virtue of his assignation from the said John, he promised faithfully he should straight pay the said suspender, which, though he did not, and caused him take a bond, which promise he is content to refer to the charger's oath, if need be. And, therefore, seeing the said decreet stands yet unreduced, and no payment has followed thereupon, the suspender cannot be bound to grant the discharge craved.

But, *3tio. Esto* the said decreet were reduced, (as it is not,) yet the suspender can never be obliged to repone the said charger to his place he was in before the pronouncing of the said decreet, till such time as the charger repone him to his place as he was, *ab initio*, when John Donaldson was his debtor: for the restitution must be reciprocal; especially considering that the suspender, James Cuming, gave up his whole writs he had of the said John Donaldson to Pitfoddells, which he has kept now these thirteen years. But so it is now, that the suspender cannot be so reponed, (he not having his writs whereon to lead apprising,) the legal of the said comprising being long since expired. *Ergo*, The letters ought to be suspended.

4to. The suspender, *brevitatis causa*, repeats the whole reasons of review before adduced; as also the reasons in Davidson and Ramsay's suspension.

Pitfoddells, pursuer in the first action of declarator, defender in the second of review, and charger in the two last, being suspensions, compearing by his procurators, there is produced for him, the two contracts passed betwixt him and John Donaldson, both registrated; then a charter, granted by Pitfoddells to the said John, in implement of the said contract; then John his declaration; then his assignation made to his creditors, with their bonds and discharges they gave up to Pitfoddells, all registrated; which would be tedious to report, having touched them all already in the deduction of the matter of fact. In the said action of declarator, compearance being made for the creditors-assignees, who, to their former reasons of review, add the following ones:—

1*mo.* That the said creditors, being assigned to sums due by Pitfoddells to Donaldson, and having granted discharges thereof, for which they received bonds of borrowed money, the said discharges of the said sum did wholly take away the right of the wadset, which was only accessory and for the security; and so the said creditors-comprisers had no right or wadset, competent to the said John Donaldson to comprise, unless it may be for the sum of £1373, which remained with Pitfoddells unassigned.

2do. Not only did they give him discharges of the sums, but a grant of redemption, which, being delivered to him, did sufficiently extinguish the right of the wadset; at least it was Pitfoddells' fault if it did not, seeing he might have registrated the same *debito tempore*.

3tio. Albeit there had been no grant of redemption, but only most invalid discharge, yet seeing Pitfoddells accepted the same, and transacted, by granting them new bonds, he can never be heard to quarrel this transaction.

4to. Pitfoddells is not able to put the assignees in that case wherein they were before transaction, and, therefore, cannot be restored himself; seeing the restitution must be reciprocal.

5to. The creditors-assignees had assignations, not only to the sums due upon the wadset, but also to all other right due to their cedent, John Donaldson, by Pitfoddells or his son; and yet, upon John Donaldson's naked declaration, after he was bankrupt, at least after he was denuded by these assignations, the then English Judges did find, that several bonds (for which no real right was granted,) might be preferred to the said sums of money on the wadset.

6to. The creditors-assignees infallibly must have right to all the back-tack duties preceding the comprisings; notwithstanding of all which, they most unjustly give forth decreet, that Pitfoddells was not debtor to them by his bonds.

But *1mo.* The same decreet, preferring the apprisers to the assignees, was most unjust; because the right of wadset, by the discharges, prior to the comprisings, was extinguished, seeing the principal, which was the sums of money, was thereby discharged; and the wadset, which was the real right, did fall in consequence, being but an accessory.

2do. There was a grant of redemption, and albeit it was not registrated *debito tempore*, yet that being occasioned not by the assignees their negligence, but in respect of supervenient change of government, discharging the king's authority and his registers, the not-registration thereof could be no just ground whereon to prefer the comprisers to them.

3tio. It is offered to be proven, that the Lady Waterton, by intromission with moveables and otherwise, is satisfied of the most part of the sum for which she comprised; and yet she, with the rest, is unjustly preferred to the creditors-assignees.—

All which allegeances, together with the reasons of review and suspension before set down, being well and ripely considered by the Lords, together with the writs produced to Pitfoddells, they adhered to the said decreet in 1656, in all the points thereof;—they found the creditors-assignees had not obeyed the same;—they ordain them to obey it: and so, *1mo.* prefer the comprisers to them, as to the said sum of £15,245, that was on Pitfoddells' lands;—they ordain Pitfoddells' bonds to be delivered him up again, if not registered; if registered, then an extract, with a sufficient discharge;—ordain them to refund and repay to Pitfoddells what annualrents they had received from him upon his said bond, with the annualrent of the same since its delivery to them;—ordain execution to pass on such bonds as any of the said creditors-assignees had granted to Pitfoddells at the paying them the annualrent;—declare that they will never hear the said creditors-assignees oppone against the said decreet in no time coming;—assoilyie, *simpliciter*, Pitfoddells from the action of review intented at their instance against him;—declare him quit and free thereof, and that notwithstanding of the reasons of review above mentioned, both principal and eiked. Finally, find the two charges at Pitfoddells' instance against the said creditors-assignees, for implement to him of his decreet in 1656, orderly proceeded against them;—find, therefore, the suspensions abusive.

And thus the Lords decerned, notwithstanding that the procurators for the creditors-assignees, pursuers in the said summons of review, and defenders in the said action of declarator, suspenders of the foresaid charges, AL-

LEGED, That they ought to be assoilyied from the said action of declarator: *Item*, That the said decreet, in 1656, and charges thereon, ought to be reviewed, reduced, and *simpliciter* suspended; because, whenever there is a person accepting delegation of another debtor, and thereupon getting new bond in place of his former, whatever might have been alleged against the old debt, the same can never be a ground whereupon to quarrel the new: so that the said John Donaldson having assigned the creditors to sums addebted to him by Pitfoddells, Pitfoddells accepting the assignations, and retiring the bonds they had of the said John, and willingly granting them new ones in the place of the old, Pitfoddells can never quarrel their old right: and, for proving thereof, did adduce several laws, (*de novationibus et delegationibus*;) and instanced in the case of a preceptor bill of exchange.

But *2do*. The said creditors-assignees, having given up all their whole rights they had from John Donaldson, only in contemplation of the new bonds Pitfoddells was to grant them, they being denuded, could do no diligence against him, by comprising or otherwise: but if Pitfoddells was *in culpa et in mora* not to secure himself, seeing he had both *actionem mandati et actionem negotiorum gestorum* competent to him, seeing he might have apprised on the bonds delivered to him, at least in the assignees' names,—it's more reasonable that Pitfoddells suffer than poor Alexander Galloway and the rest of the creditors-assignees; especially considering that Pitfoddells' prejudice, and distress he sustains thereby, arises not from any fact or deed of the said assignees.

3tio. The assignees cannot be obliged to redeliver Pitfoddells his bonds, seeing in law he has neither *actionem* nor *condictionem indebiti* for the same; for that is only competent where persons have paid that which was *indebitum*, or paid it *non vero creditori*: but neither of these is here, seeing the assignees only got bonds for what was really due to them.

4to. It is evident Pitfoddells took the hazard of their rights upon him, by the very discharges he accepted off them, which bear only warrandice from their own proper fact and deed allenarly.

To this it was ANSWERED for Pitfoddells:—*1mo*. That the reason of review is now not competent, being omitted in the *prima instantia*, and that not only by Alexander Galloway, the cedent, but also by Glenkindie, his assignee; and, therefore, he cannot now be heard.

2do. When Pitfoddells granted new bonds to the said creditors-assignees, it was *intuitu* of their rights and assignations, which he conceived to be good and valid; but it being now found that their right was nought, and the sum foresaid is only due to the comprisers, Pitfoddells, in all law and equity, has *condictionem indebiti et condictionem sine causa* of the said bonds.

3tio. Pitfoddells is not in the case of delegation; because, in law, *delegatio tollit priorem obligationem*; so that *delegatus* becomes *debitor ei cui fit delegatio*; not upon the account of any right in the person of him that is delegated, but upon the desire *delegantis, cujus fidem sequitur* as to his security or repayment. But Pitfoddells is in the case of *cessio*, which does not take away *primariam obligationem*, but conveys only the same in the person of the assignee; and, therefore, Pitfoddells having paid an assignee *intuitu* of his right,—which right is after found to be no right,—undoubtedly Pitfoddells is in the case of *condictio indebiti*; especially considering, that though Pitfoddells were in the case of *delegatio*, as he is not, yet that would only debar him from personal exceptions,

arising *ex persona delegantis*, as, *vis, metus, fraudis*, and such like, and not as to other exceptions that are real, *et contra ipsam delegationem*, as appears by the laws cited by the contrary advocates; and may be sustained in the case of one who is debtor to a minor, having curators; for, if the minor's debtor should pay the debts to a person having a precept or assignation from the minor, without consent of his curators, and thereafter should be forced to pay the same to another, who has right by assignation from the minor, with consent of his curators, the debtor would undoubtedly have *condictionem indebiti* against the first assignee: *Ergo, multo magis* must Pitfoddells have *condictionem indebiti*, because he is in the case of *cessio*, and not of *delegatio*. Neither is Pitfoddells in the case of a precept or bill of exchange; because, where a precept is given, the person in whose favour it is drawn gets no right nor assignation to the debt due by the person upon whom it is drawn; and, if the debtor make payment, it is not *intuitu ullius juris*, standing in the person of the party who gets payment, but upon the account of the drawer of the bill, *cujus fidem sequitur*, and who must be his paymaster. But here Pitfoddells made payment *intuitu* of a right in the person of the assignees, which he thought valid, and yet is found invalid through the assignees their fault, who might and ought to have perfected their rights for their own security, and Pitfoddells his liberation. And, where it is alleged that thir assignees *receperunt suum*;—

It is ANSWERED, That, it being now found that the foresaid sum was not theirs, but the comprisers', they cannot be said *quod receperunt suum sed alienum*; the same sums for which they got bonds not being theirs, but the apprisers', whom Pitfoddells is only ordained to answer, as having only right thereto. As to that, that Pitfoddells seemed to take his hazard of the said right, because of the warrandice from fact and deed allenarly;—

It is ANSWERED, 1*mo*. That Pitfoddells is not pursuing now upon the warrandice, but upon that undoubted ground in law, whereby one having paid any thing *indebite* to a person who is found to have had no right, has *condictionem indebiti*; which is clear in law, when discharges or rights are granted for onerous causes, then though the warrandice be conceived in these terms, from fact and deed, yet it doth not debar those who have acquired these rights to suit any other remedy in law, especially *condictionem indebiti*, and to repeat what was *indebite* paid for such rights; as is clear *per L.* 11. § 18. *De Actionibus Empti*; ubi, *Si aperte in venditione comprehendatur*, nihil evictionis nomine præstatum iri, *pretium quidem deberi re evicta, utilitatem non deberi. Neque enim bonæ fidei contractus hac patitur conventione, ut emptor rem amitteret, et pretium venditor retineret.* As this is clear in law, so the same may be evinced from several cases, as if payment be made to an heir of a moveable sum that was due to his predecessor, and the executor should force him to pay the same to him, as falling under executry, the heir may be compelled to repay it to him, though the warrandice be but from fact and deed: *Item*, If a second brother, on report of his elder brother's death, should be served heir to his father, and so his father's debtors pay debts to him on his discharge, containing warrandice from his own deed; and, thereafter, his elder brother, who was out of the country, returns home, and reduces his brother's retour, and force the debtors to pay over again the sums that were due to his father, the debtors may repeat the money they paid to the second brother from him, notwithstanding that the warrandice was only from his own fact and deed.

3tio. If a debtor should make payment to an apparent heir, upon his discharge, with warrandice from his own deed, and the apparent heir, to whom he paid, die before he be served heir, and the debtor so be forced to pay again to another, who is served heir, he will have *condictionem indebiti* against those who represent the apparent heir, to whom he had made payment, notwithstanding of the said warrandice.

From these instances, and many others that might be adduced, it is evident that the warrandice of discharges, though conceived in the terms foresaid, from fact and deed; yet, if they be for onerous causes, those who have *indebite* paid any thing, may legally repeat the same, if, afterwards, they chance to be forced to pay to others found to have better right; seeing, *eodem errore*, and on the same mistake that they were induced to pay *indebite*, it may be thought they have been induced to accept of the warrandice foresaid.

In law, also, warrandice, from the fact of the granter thereof, doth import that he has a valid right, and *jus quo*, though not *jus quod;* and, therefore, if the granter of the said discharge have no valid right established in his person *habili modo*, and if the receiver of the discharge be forced to pay the same again to another having a better right established in his person *habili modo*, the law doth interpret the eviction to be on the granter's fact and deed; seeing it was his *culpa* that he did not perfect his right, as shall be made clear by the cases following, *viz.* In the case of an executor-creditor confirming an heritable sum, and so getting payment thereof from the debtor, upon his discharge, with warrandice from fact and deed, if that debtor should be forced to pay again the same sum to another creditor who had apprised the same, he may repeat it from the executor-creditor; and the eviction would be thought to be the fact and deed of the said executor, because he had not settled the right of the said sum in his person *habili modo: Item*, In the case of a compriser disponing his right, with warrandice from his own fact and deed, if a posterior compriser be preferred, because it may be the disponer's apprising is null, not being on fifteen days' warning, or because his seasine is not registrate, the eviction will certainly be upon the fact or deed, or *culpa* of the disponer, who ought to have perfected and completed his right, and did it not. From all which it is evident that Pitfoddells, notwithstanding of the said warrandice, ought to be free of the said bonds, being *indebite* given; especially considering that the said bonds were granted for their whole respective sums, without defalcation; and, therefore, they should have granted him also complete warrandice from all hands, and not from fact and deed, which is not usual in discharges of that kind.

Lastly, For Alexander Galloway, and Glenkindie, his assignee, they can never be heard to review the said decreet; because they have homologated the same, in so far as they have granted Pitfoddells' bonds of borrowed money for the annualrents he paid them.

As to that which they say,—that Pitfoddells either knew, or at least should have known, the assignees' rights, and secured himself, seeing he had their bonds in his hands, it is ANSWERED, That, in law, *error etiam juris et facti proprie non obstant*, to take away the remeid *condictionis indebiti;* especially in this case, where Pitfoddells seeks nothing but to be free of bonds *indebite* given, *et certat de damno vitando.* And as to that,—that he might have comprised, that is false; for he had no assignations to comprise on, but only discharges of their

bonds, so that the creditors should have secured themselves, seeing he could not. *Item*, It were most absurd to cause Pitfoddells pay a debt twice; who has spent as much in pleas thereanent as the sums come to. To which it was replied by the procurators for the creditors assignees, that their debts being lawful debts, and *sponte* paid, neither *metus, vis* nor *fraus* inducing Pitfoddells thereunto, they needed not inquire if *delegans* was a lawful debtor, or if *delegatus* had a discharge: it is sufficient to them that he accepted Jo. Donaldson's letter of advice; took a discharge of the old bond; and gave a new one, which is a clear delegation. Nor were thir assignees so much as obliged to know that Jo. Donaldson was debtor to Pitfoddells, *T. C. de delegationibus.* To that part of the answer, that its here *cessio* an assignation, and no *delegatio*, its replied, there is here more nor *cessio, videlicet cessio, intimatio, acceptatio, et solutio*, which are all the requisite solemnities of *delegatio.* To all the grounds and instances to infer that *condictio indebiti* must have place, here its replied, that *condictio indebiti* imports two things; first, that it be *indebite solutum;* next, that it be *solutum non vero creditori.* Now, here it cannot be said *indebite solutum*, for they were true and real debts, as cannot be denied. To that anent *ignorantia juris in damno vitando et lucro captando*, its replied, that the parties are here *in pari casu.* Either the said Alexander Galloway, with the rest, must lose at Pitfoddells' hands; or Pitfoddells must lose at John Donaldson's hands. But now Alexander's case is by much the more favourable, since, having a right, Pitfoddells paid him willingly, without compulsion, *fraus* or *metus*, on his discharge. If Pitfoddells say, there ought to have been a renunciation or grant of the redemption, its replied, that Pitfoddells should have sought that before John Donaldson broke; and not kept up their bonds, and yet do no diligence thereupon, whereby the [said] Alexander, and the rest, were prejudged, who might otherwise have come in *pari passu* with the apprisers; all which makes Pitfoddells' case most unfavourable. To the answer anent the warrandice frae fact and deed, its replied, that its neither his ignorance nor knowledge that occasioned the conception of the discharge in these terms; but express paction betwixt them, which, by the laws of nature and nations, ought to be most religiously and righteously observed. To that, that it was competent, *in prima instantia*, and omitted, its replied, that in 1656, such was the iniquity of the English Judges, that when they were petitioned to hear further defences, (among which this was one,) they had, they refused the same. As to the pretended homologation of Alexander Gallowaye's, its replied, that the cause of these bonds granted by him to Pitfoddells is not of the annual-rent. Why may it not be for other sums borrowed by him from Pitfoddells? So then the homologation says nothing.

Notwithstanding of all which, the Lords, by the interlocutor, again adhered to their former decreet pronounced by them. Whereupon Pitfoddells and his son, urging to get furth the extract of their decreet, the same was opposed by the assignees their procurators, who desired yet to be heard, *in presentia*, anent some other defences against the said decreet of declarator: which favour being granted them, they alleged, 1*mo*, That the reason, (as they conceived,) wherefore the Lords had repelled all their former reason, with the debate following thereupon, was merely in consideration that the money wherefore Pitfoddells gave bonds was a part of the sum of L.15,245 contained in the contract of wadset. But now they allege that the bonds given by Pitfoddells to the said creditors assignees, was because of their letters of advice they had from the said John Donaldson to Pitfoddells, entreating him to pay to the assignees that money which he owed them, on

personal bonds. The letters of advice Pitfoddells accepts, and grants them bonds for their several sums; so that Alexander Gallowaye, and the rest, ascribe their payment to John Donaldson's letters of advice, and their own personal bonds, and not to the said wadset; and therefore it cannot be said that the said bonds were granted by Pitfoddells *indebite*. *Item*, Craves that the discharges granted by thir assignees to Pitfoddells may be read and considered. Whereto it was answered for Pitfoddells, that they opponed the discharges and assignations, by which it was evident that Pitfoddells granted his bonds only in part of the said L.15,245 contained in the said contract of wadset; and that it was merely the ground and rise thereof.

All which the Lords having considered, they adhered still to their former interlocutor; and ordained the decreet to be extracted, and given forth. Whereupon Alexander Galloway gives in a supplication to the Lords, shewing that Pitfoddells having granted him a bond in payment of a just debt, resting to him by John Donaldsone by his order, the said Pitfoddells now repeats the same, *condictione indebiti*, contrary to all law and reason; for in law its uncontroverted that *condictio indebiti* is not competent to him who pays me a sum in name of him who is my debtor, *per C. 8va. et 44, D. de condictione indebiti*. In reason he cannot repeat, because now John Donaldsone is not *solvendo*, and Pitfoddells, the time of the granting the bond, made the supplicant discharge John Donaldsone, *per expressum*, so that all action the supplicant might have had against John Donaldsone was *funditus* taken away: but Pitfoddells might have intented action for his relief against the said Jo. who then was in great trust and credit, and no diligence done against him. As to the strongest reasons adduced for Pitfoddells, they are neither grounded in law nor reason. Amongst many instances proposed for him, this was one, (the rest are of the same nature,) that if a debtor upon an heritable bond pay the same to the executor, if the heir pursue, he will get repetition thereof from the executor. To the which it is answered, that the supplicant, with the rest of the creditors assignees, are not in that case, nor the like, in respect that a debtor on an heritable bond was neither resting the same to the executor, nor paid he it in name of any other who was resting the same. But so it is, that Pitfoddells granted the supplicant his bond for payment of a true and just debt; and that by John Donaldson's order and in his name. As to L.11. *p.* 18. *D. de actionibus empti*, cited for him, where its said that he who buys a thing that is evicted, will get repetition of the price; to that it is answered, that the creditors' assignees are not here in the like case, in respect that he who buys a thing (the same being evicted) was not obliged to pay the price to the seller, neither did he pay it in name of any other who was resting the same, which is the condition of the supplicant. *2do*, The two cases adduced are most different from the present case, to which they are applied; in respect a debtor upon an heritable bond, and he who buys a thing afterwards evicted, can have no action of relief but only against the executor and seller; whereas Pitfoddells had action of relief against John Donaldsone. It is added for the supplicant, that he is a man of eighty years; a father of many motherless children; must turn beggar if this be taken off him; that he hath not so much in the world as this sum comes to; that he is so weak that he cannot now be present to wait upon the Lords, when his whole fortune lays at the stake; and therefore craves that Pitfoddells' decreet may be stopped as to him. This bill the Lords having considered, they refused the desire thereof.

Then Pitfoddells craving the extract of his decreet against Cuming, David-

sone, and the others, the same was opposed by their procurators, who alleged that for his debt he had obtained decreet, *parte comparente (for Cuming)* in 1652; which decreet stood yet unreduced, though the same English Judges that had pronounced it gave out decreet in the contrary in 1656, which he craved to be reduced. To this it was replied by Pitfoddells' procurators, that the apprisers, who were now found to have only right to the said sum, were neither called nor compeared (which should have been) in Cuming's decreet in 1652. *2do*, The apprisers' right to the sum on wadset is emergent since the said decreet; as also their decreet of preference, wherein the English Judges did most justly, because these assignations given by John Donaldsone to the creditors assignees were not *habilis modus*, to transfer the right of wadset to them; and the comprisers, though posterior, must be allowed as having the undoubted and only best right. To which it was duplied, that their allegeance, notwithstanding of this reply, stands relevant, because they lay this down for a ground and maxim, that the English Judges in 1656, *super iisdem deductis*, took away their own decreet in 1652, which they could not do no more, nor the Lords of Session can now; and craved the said Lords their answer, thereupon. The Lords repelled the allegeance, and duply, in respect of the reply made thereto, and decerned, *ut supra*.

Upon pronouncing whereof, it was further alleged for the said creditors assignees, that the decreet preferring to them, the comprisers, ought to be reviewed, because unjust, seeing they offer them to prove that their discharges granted to Pitfoddells bore a most sufficient renunciation of the wadset; and craved that they might be read in *præsentia*, which was accordingly done. *2do*, Though the said assignations and discharges had not borne a renunciation, yet they might have been a sufficient exoneration to the said Pitfoddells; because a great part of the said principal sum of L.15,245, wherefore the lands were wadset, being paid, any infeftment following thereupon being but *accessorium*, must be presumed to be extinguished *pro tanto*. *3tio*, The least that the then English Judges could have done, would have been to bring in the apprisers and assignees *pari passu*, as is ordinary when persons have to do with bankrupts; which, nevertheless, they did not. To this it was replied in behalf of Pitfoddells and the comprisers, that an assignation and renunciation in one right are *asystata* and incompatible, and oppened the assignations. To the other; its not the sum that is the principal, but the heritable right; and the sum whereupon it is redeemable is only the *accessorium*. Now its notour, that *jus reale*, whether redeemable or not redeemable, can only be taken away in as solemn a way as it is constituted by. And about there coming in *pari passu*, its replied, that the then judges in equity could do no otherwise than they did; that is to say, prefer these who had the real and undoubted right, to those that had no right at all. Whereunto it was duplied, *1mo*, That its noways inconsistent to have an assignation, and for the debtor's greater security, a discharge or renunciation, which is the innovation of the reversion; and oppones the last clause thereof, which is a clear renunciation and grant of redemption, *pro tanto*; and if it had been registered *debito tempore*, the same would have secured Pitfoddells for ever. To the other, that an heritable right cannot be taken away, but by a renunciation or resignation; it is duplied that the same may be, because a wadset is but *pignus* for security of a sum; and the sum being paid, the *pignus* should be restored. *Item*, Intromission, with as much of the maills and duties of lands as will satisfy a compriser within the legal, is as sufficient to extinguish the apprising, as if the party compriser had renounced the same. *Item*, In a wadset if there be used requisition or a charge of horning; then payment

and a discharge without a renunciation is sufficient; or where a wadset is only granted for security of a sum, with possession of lands while by the rents thereof the sum be paid, there is no need then of a renunciation: for though by our law of Scotland, registration is well prescribed to extinguish wadsets; yet that is not the only solemn way to take them or comprisings away. And, therefore, if payment in the cases adduced, would be sufficient with a discharge, and without a renunciation; so must it also be in this present case. And to enforce the last about *pari passu*, they instanced the practique betwixt Brown and the Laird of Westnisbet, and many others, where creditors of bankrupts came in *pari passu*. Farther, they added that the principal contract of wadset, passed betwixt Pitfoddells and John Donaldsone, was given up in 1652 by Alexander Gallowaye to Pitfoddells, and that there was no seasine then thereupon, which was a most evident renunciation; which if Pitfoddells had then destroyed it had secured him and them for ever. But afterwards they know not how it was unjustly registrate by one Forbes, (who never was a clerk in the world,) the truth of the delivery whereof they are content to refer to Pitfoddells his oath.

Compear the procurators for the comprisers, and allege that Pitfoddells could not depone to their prejudice, who by the foresaid decreets are preferred. But whenever the creditors assignees pursue an action of improbation of their comprisings, or of the said seasine, they shall then get an answer; but its not competent *hoc loco*.

All thir being ripely considered by the Lords, they, notwithstanding of all that was alleged, adhered to the former decreet pronounced in all the points thereof; only they reserved to the said Alexander Galloway, and the rest of the creditors assignees, action of reduction or improbation of the seasine above mentioned against Pitfoddells, and the others.

Immediately after the pronouncing of which decreet, it was further alleged by the said creditors assignees, that there was a transaction and agreement betwixt Pitfoddells and the said apprisers, whereby they were to give down to Pitfoddells the half of their sums; the benefit of which defalcation in all conscience and reason, they allege should accresce to them, and not to Pitfoddells himself; the verity of this transaction they referred to Pitfoddells his oath. To which it was answered, that the foresaid allegeance was no ways relevant, because competent and omitted in the prior decreet. *2do*, Its neither libelled, nor eiked; neither in the review nor the two suspensions. *3tio*, There was never such an agreement concluded and ended. Like as Pitfoddells being personally present at the bar, made faith that there was no such agreement concluded, neither papers interchanged; because the raising the foresaid two suspensions or summons of review marred all. In respect of which answer and deposition, the Lords repelled the allegeance aforesaid.

Then it was farther alleged by the procurators of the said creditors assignees, that in all equity they must be preferred to the tack-duty of the lands wadset, that were owing preceding the said apprisers their decreets of apprising; *igitur*, *&c.* Whereunto it was answered that there was no byruns owing, all before the said apprisings having been paid to John Donaldsone, the cedent himself. In respect of which answer, the Lords repelled and repel the foresaid allegeance; yet before extracting of the said decreet, the Lords remitted to Sir David Nephoy of Reddie, to clear, if there were any byruns of the back tack-duty resting before the leading the apprisers their several apprisings.

After which reference, the parties compearing by their procurators before the said Lord Reddie, it was alleged for the creditors assignees, that notwithstanding of John Donaldsone's declaration in 1652, whereby he declared that the only sum he had on

Pitfoddells' lands was but L.15,245, and not L.16,000; yet Pitfoddells must be liable for the whole back tack-duty of L.1040, contained in the said second contract betwixt them; and that in regard that the said declaration is but the declaration of a bankrupt. *2do*, Offers him to prove that Pitfoddells was indebted to John Donaldsone in several other sums of money, besides that contained in the said contract; which the said creditors assignees crave may be made forthcoming to them. Whereunto it was answered for Pitfoddells, that the allegeance foresaid was competent and omitted. *2do*, That the creditors' assignees cannot quarrel the foresaid declaration, because their assignations and this declaration are of one and the same date, yea, *laborant eodem vitio*, for they bear that he was then going out of the country. As for the personal debts alleged due by Pitfoddells to John, he denies there were any; and if there were, let the creditors assignees pursue against him, *via ordinaria*, for the same, and they shall get an answer.

Which allegeances and answer thereto being reported by the said Lord Reddie to the whole Lords, they repelled and repel the allegeance in respect of the answer thereto; and find only half a year's tack-duty of the said sum of L.15,245 resting owing before the said comprisings; which the Lords ordain to be consigned in Robert Hamilton, clerk to the process, his hands to be made forthcoming to such of the creditors assignees of the said John Donaldsone, as shall be found to have best right thereto. *Item*, The Lords reserve action for any other debt due by Pitfoddells to John Donaldsone, by and attour the sum foresaid contained in the wadset, at the creditors assignees their instance. Finally, ordain letters of horning on a simple charge of fifteen days, and other executorials needful to be directed thereupon, in form as effeirs. According to which ordinance of the Lords, immediately after the same, Pitfoddells consigned L.457 as the said half-year's tack-duty to be made forthcoming as is aforesaid.

Pitfoddells compears by Sir Jo. Fletcher, King's Advocate, for the King's interest; Sir John Nisbett, Sir Thomas Wallace, and Patrick Fraser. The creditors assignees compear by Sir Peter Wedderburne, James Brown, Mr. David Thoires, Mr. William Strachan, and Mr. Alexander Seaton.

Signet MS. No. 68, *folio* 21.

1664. *January* 14. THOMAS MONCUR *against* JAMES DOUGLAS of Inchmarto.

MR. JAMES DOUGLAS of Inchmarto, in 1660, by his bond obliges him to pay to James Petrie, and Janet Findlay his spouse, indwellers in the Wood-End of Glencomon, the sum of 400 merks, with L.100 of expenses. James Petrie, again, by his back-bond granted to Inchmarto, obliges him, that if Sir William Douglas of Glenbervie, and James Douglas of Stampeth, his father-in-law, obtain decreet against him for the said sum of 400 merks, grounded upon a tack; that then, and in that case, James Petrie shall suit no payment upon this bond of Inchmarto's; but re-deliver him it. Whereupon Inchmarto granted Glenbervie his bond for the said sum of 400 merks, in case he should be found to have best right thereto. Glenbervie thereupon raises a summons against Inchmarto and James Petrie for payment making to him of the said sum of 400 merks. While this is depending, James Petrie assigns the bond he had from Inchmarto for the said 400 merks, to Thomas Moncur, son natural to Thomas Moncur, goldsmith in Aberdeen. He

upon his assignation raises letters of horning, and charges Inchmarto to pay the said 400 merks to him. Inchmarto suspends upon double poinding, and concludes that he may not be liable in double or twice payment; seeing he is willing to pay to any of the two persons that shall be found to have best right thereto. The double distress he instructs by James Petrie's back-bond to him; by his bond he has granted to Glenbervie; and by the summons raised at Glenbervie's instance, for payment making of the same sum as yet depending; which all would be good reasons of suspension against the cedent; and, therefore, also against his assignee; especially here, where the assignation is to the cedent's behoof, as he offers to prove by his oath of verity: craves, therefore, the letters be suspended, while the action intented at Glenbervie's instance be determined. This suspension being called, there was produced for the charger the registred bond and the assignation. To the reason of suspension it was answered by the charger's procurators, that the same ought not to be respected, because by the back-bond, the charger's cedent is only obliged to refund the sums, in case Glenbervie should recover decreet before the late Commissioners; which he has never done; *igitur*. *2do*, The charger, in case Glenbervie was ready to insist for his foresaid summons, was willing to dispute with him. *3tio*, Offers to the suspender (he paying the sum charged for) to grant him a discharge, with absolute warrandice at all hands.

All which being considered by the Lords, they find the letters orderly proceeded, and ordain them to be put to farther execution; ay and while the suspender pay to the charger the said 400 merks, with the L.100 of expenses. Always reserving to Glenbervie his action upon the tack for the said sum, against the said James Petrie, the charger's cedent, as accords of the law.

Suspender, Patrick Fraser. *Alt.* Mr. Andrew Birnie.

Signet MS. No. 71, *folio* 27.

1664. *January* 16. ANDREW ARRAT *against* JO. LINDSAY of Edzell, and JO. LINDSAY of Pitstandlie.

IN anno 1651, George Lord Spinie, as principal, Jo. Lindsay of Edzell, and Jo. Lindsay of Pitstandlie, as cautioners, by their bond oblige them to pay to Isobel Arrat, lawful daughter to William Arrat of Dunbaro, the sum of 3000 merks. Isobel in 1654 registers it; and in 1658 she assigns the same, with consent of Jo. Ramsay of Augharagh; to Alexander Arrat, her brother-german. He, by his disposition in 1661, transfers the same to Andrew Arrat, his brother; who charges Lindsays, the cautioners, with letters of horning thereupon. Thir they suspend, 1*mo*, Because the same charger having formerly charged them on the same bond, they had suspended him then; which suspension, (though often called and disputed *in foro contradictorio*,) stands yet undiscussed; it was therefore mere malice in the charger to raise new letters of charge against them, only to put the suspenders to trouble and unnecessary charges. *2do*, Though the cause of the bond granted to Isobel Arrat, whereon the charge is founded, is said to be borrowed money, yet it is notour that the said Isobel never delivered any more to the said Lord Spinie, nor the half of the said sum of 3000 merks; only the bond was granted for the whole, because she faithfully promised to pay the rest within

a very short space; which, though she never did, and this the suspenders will refer to her own oath of verity. *3tio*, The charge, besides that its unjust, is also most informal; for my Lord Spinie (who nevertheless is principal debtor) is not only not distressed for this debt, but not so much as called; who, though he has receipts or discharges of a part of the said principal sum, with the most considerable part of the annual-rents that he has paid; and therefore a time at least ought to be granted the suspenders, to produce him, to the effect he may exhibit these receipts. At the calling of this suspension, to thir reasons there was eiked this other, that the letters must be suspended, because the same 3000 merks, wherefore they were caution, was arrested in their hands at the instance of Francis Guthrie of that ilk, as belonging to him by virtue of a contract in 1660 betwixt him and Alexander Arrat, the charger's cedent; whereby Alexander obliged him to assign, or *per verba de presenti* did assign to him the said bond of my Lord Spinie, with the sum therein contained; *item*, obliged him for causes therein contained, to deliver the said bond to Guthrie: and, therefore, till this arrestment be purged, or till it be found who has best right to the said sum, the letters must be suspended. For proving this reason, there is produced the executions of an arrestment proceeding on the Sheriff of Forfar his precept in 1663, whereby the sum now charged for is arrested, aye and while the said contract be fulfilled to him. To this eiked reason of suspension it was replied, that they would purge the arrestment, and for purging thereof produced a discharge under the Laird of Guthrie's hand, whereby he grants him to have full satisfaction of all that was addebted to him by Andrew Arrat; and particularly of that contract that was betwixt them in 1660.

Then it was alleged by the suspenders, that they offered them to prove by Isobel Arrat (to whom the bond was granted) her oath of verity. *1mo*, That she never really delivered to my Lord Spinie more nor the just half of the sum contained in the bond; and that at the granting thereof. *2do*, That before the assignations made by her, she received payment of the whole byegone annual rents of the said principal sum. Whereunto it was answered by the charger, that he would not suffer his cedent's author, Isobel Arrat, to depone to his prejudice who is assignee. To which it was replied by the suspenders, that they offered them to prove by his oath, that the translation made to him of the said sum was to his sister Isobel's behoof; *item*, by Alexander Arrat's, his cedent's oath, that this pursuit is to Isobel's behoof; and so she will [be] obliged to depone.

Which allegeance for the suspenders, with the reply, the Lords found relevant, to be proven first by Andrew and Alexander Arrat their oaths; a certain day is therefore assigned to their procurators to produce them, to the effect to give their oaths. In obedience whereof, Alexander Arrat, being solemnly sworn, deponed, that the assignation made to him was to his own proper use and behoof, and not to his sister Isobel's; which deposition the Lords having considered, they refused to take the said Isobel, her oath, to the assignee's prejudice; because the deposition proved not the reason of the suspension referred thereto; and therefore found the letters orderly proceeded; and ordained them to be put to execution, aye and while the suspenders paid the sum charged for.

After pronouncing which interlocutor, the suspenders gave in a supplication to the Lords, bearing that the said bond was really granted, *spe tantum numerandæ pecuniæ;* the rest having been promised at such a day; betwixt and which day the Lord Spinie going in with his Majesty to Worcester, the same was never delivered; and this they

offered to prove thus:—by the charger's oath they would prove that the translation was to Isobel's behoof; by his cedent's oath, that this pursuit is to her behoof; and to her own oath the truth *exceptionis non numeratæ pecuniæ:* but now the said Isobel (in whose oath the foresaid reason would ultimately have terminated for proving thereof) is dead, so that the supplicant is prevented in the probation of his foresaid reason by her said oath; therefore beseeches the Lords they would ordain the charger, and his cedent, to depone anent that reason; to whose oath he now referred the same *simpliciter;* to wit, whether or no, to their certain knowledge, the one half of the said principal sum was only delivered at the subscribing of the bond charged upon. *Item,* Craved the letters might be suspended to eight years' annual rent, conform to the Act of Parliament made in favours of forefaulted persons, (such as the Lord Spinie was,) and their cautioners.

Upon reading of this supplication, the Lords caused call the charger's procurators to hear what they had to say against it, who alleged that the foresaid desire could not be granted, seeing an act of litiscontestation was already extracted, and the cedent had deponed already; yet of consent were content to admit the reason above written as relevant, *cum onere maximarum impensarum,* providing there be no farther suspension plead in this matter. Whereupon they being examined upon oath, deponed *negativè,* that for any thing they know their sister did pay the whole sum now charged for, to my Lord Spinie. In respect of which deposition, not proving the reason that was referred thereto, the Lords found the letters orderly proceeded, aye and while they were obeyed; suspended them for eight years' annual rent; and found the arrestment sufficiently purged.

Suspender, Mr. George M'Kenzie. *Alt.* Mr. Robert Sinclair, Sir George Lockhart.

Signet MS. No. 76, folio 29.

1664. *January* 16. GEORGE JOHNSTON *against* JAMES TWEDIE and WALTER TWEDIE.

In anno 1656, James Twedie in Hairston, as principal, and Walter Twedie, his cautioner, by their bond of corroboration, obliges them to pay to Geo. Johnston in Carryserane, the sum of 800 merks. This bond he registrates, and thereon charges them with horning; which charge they suspend, because the charger, by his ticket or discharge in 1657, granted him to have received payment of 300 merks, in part of the foresaid principal sum of 800 merks; and that by accepting a bond of 300 merks, wherein Jo. Grege obliged him to pay to Ja. Twedie, or his, the sum of 300 merks, which the said Ja. assigned him to. Then again, the same charger, by his other ticket in 1659, grants him to have received from the suspender the sum of L.187, also in part of payment of the foresaid principal sum contained in the said bond of corroboration; and therefore discharged him thereof, *pro tanto.* And for the remainder of the aforesaid principal sum, they had truly paid the same, conform to precepts drawn upon them by the charger; which they referred to his oath of verity. *Igitur,* this charge being for the said whole sum of 800 merks, ought to be suspended.

At the calling of this suspension, there is produced for the suspenders the said two discharges, together with another, whereby the charger grants him to have

received L.66, and that in contentation of his annual rents owing him for the said sum by Ja. Twedie. For the charger there is produced the bond of corroboration, with the letters of horning and executions thereof; and alleged by them that the discharges produced ought not be respected to infer any liberation from the said charge *pro tanto*, because they discharged sums above L.100; and, not being holograph, are not subscribed by four witnesses.

In respect of which allegeance, the Lords would have no respect to the said discharges: whereupon the suspenders were content to refer the truth of the payment contained in the said discharges to the charger's oath of verity *simpliciter*. For which effect a day having been taken to produce him, he deponed he had indeed received L.387 in part of payment of the foresaid principal sum of 800 merks, but no more. In regard of which deposition, the Lords suspended the letters as to the said L.387; and found them orderly proceeded as to the rest.

Act. Suspender, Sir Thomas Wallace. *Alt.* Mr. David Dinmuire.

Signet MS. No. 77, folio 30.

1664. *January* 16. Sir DAVID SIBBALD of Rankeillor *against* Sir ANDREW BRUCE of Earleshall, and ANDREW BRUCE, his Son.

SIR ANDREW BRUCE of Earleshall, and Andrew Bruce fiar thereof, his son, by their bond in 1659, oblige them to pay to Sir David Sibbald of Rankeillor, the sum of 1262 merks money. In 1663, he obtains decreet against them, decerning them to pay the same. On this decreet he now charges them with horning; which they suspend on this reason, that since the obtaining the said decreet, Sir David has become debtor to the said Andrew Bruce younger, in a sum near equivalent, in so far as Sir David by his bond to Jo. Boyde, bailie in Edinburgh, obliges him to pay to him and his the sum of L.663, with L.80 of penalty, &c.: which bond Jo. Boyd has assigned to the said Andrew; who thereupon craves compensation and retention in his own hands; and so the letters must be suspended. At the calling of this suspension, there is produced for the suspender the bond granted to Jo. Boyde, with the assignation thereof made to him. There is produced for the charger his decreet with the bond whereupon it proceeded, with the letters of horning raised on the same.

All which being heard, seen, and considered by the said Lords, they compense the said L.663 with the said sum of 1262 [merks] charged for; as also the annualrents of the one with the other. But will not sustain compensation of the penalty of L.80, contained in the said bond of L.663 compensed with, in respect, the charger has been oft suspended in this matter, and the suspender's assignation to the said bond is since pronouncing the decreet charged on; so that they suspend the letters as to the said sum of L.663; but find them orderly proceeded, and so ordain them to be put in farther execution for L.330, as being contained in the said decreet, by and attour what is compensed.

Act. Suspender, Mr. Ja. Cheape. *Alt.* Mr. David Balfour.

Signet MS. No. 79, folio 30.

1664. *January* 16. JAMES BANNATYNE *against* THOMAS ROOME.

SIR JO. CHARTERS of Amesfield, as principal, Robert Charters of Bodisbey, Jo. Charters of Auchinstrowan, and George Roome of Kirkpatrick Irongray, as cautioners, by their bond in 1637, oblige [them] to pay to Ja. Bannatyne, sometime in Leith, now in Musselburgh, the sum of 5000 merks, payable the Lambmas after; with this provision, that if the said Ja. were content to supersede and continue the said payment after the term above mentioned that then the principal and cautioners, conjunctly and severally, shall be obliged to infeft him in an annualrent, effeiring to the sum of 5000 merks, to be uplifted out of any of their lands. This bond is registred in 1644. Ja. Bannatyne, in 1657, charges Thomas Roome, son to the deceased Thomas Roome of Cenden, and oy to the said George Roome of Kirkpatrick, one of the cautioners in the bond, to enter heir to his father and goodsire; and then raises summons against him, warning him to compear and hear himself decerned to pay that 5000 merks, for which his goodsire was caution. He compears, and produces a renunciation to be heir to his father and goodsire. It was objected against the same, that it was not subscribed by his tutors or curators, though he was a minor. Whereupon the then commissioners gave forth decreet against him, decerning him to pay the said sum. Yet if he or his procurators should produce a valid renunciation betwixt and June 1658, that then the same should be received. Which they failyied to do. In 1663, James Bannatyne raises a summons of wakening anent the same cause; wherein there was produced a renunciation of the said Thomas Roome: but, beside that, the same was not subscribed by his curators, it was not a renunciation to be heir both to his father and goodsire, but only to his father.

For which reasons the Lords rejected the renunciation, and adhered to the decreet in 1657; only provided that if the defender's procurators should produce a valid renunciation, subscribed by him and his curators, and wherein he renounces to be heir both to father and goodsire, betwixt and the 5th of February next the same should be received, and this their decreet *condemnatory* turned into a decreet *cognitionis tantum causa*.

Act. Mr. Samuel Gray. *Alt.* Mr. Walter Cant.

Signet MS. No. 83, *folio* 81.

1664. *January* 16. HELEN HUGGANE *against* WALTER SCOT of Briershaws.

MR. HEW ELPHINSTON in Galasheills, by his latter will and testament, nominates Walter Scot of Briershaws, his sole executor and universal legatar. Mr. Thomas Lowes, minister at Galasheills, is notary thereto. This testament Briershaws confirms. Whereafter Helen Huggane, daughter lawful to Andrew Huggane in Hadhope, procreated by him on Janet Elphinston, sister to the said Mr. Hew, as nearest of kin to the said Mr. Hew, and so founding right to his executry, thereon intents a summons of reduction of the said testament and confirmation; summoning Briershaws to compear; as also the commissary, and commissary clerks of Peebles for their interests in confirming the same, to hear and see the same declared null; on this reason, because the said nomination or testament was

subscribed by the said minister without a warrant from the defunct, Mr. Hew; at least after Mr. Hew's decease, which in law he could not do; which they offered them to prove by the oaths of the witnesses inserted; and, therefore, the same must be reduced. At the calling of the cause there is produced for the pursuer an extract of the said testament craved to be reduced: then both parties, of consent, hold the production satisfied; and to the reason of reduction, its replied for the defenders that the same is noways relevant, in respect the pursuer has produced nothing to instruct her nearest of kin, which is her active title, and so ought to be verified in *ingressu litis.* *2do,* She can never quarrel the said testament, because she has ratified the same in so far as, the defunct having left her a legacy, what the said Scot of Briershaws, his executor, should think fit to give her, she, since the defunct's decease, has demanded the same, and accordingly received both clothes and money for this defender; and so has homologated and acknowledged the validity of the said testament, by taking benefit thereby. *3tio, Nullo modo relevat,* to say that this testament is null in the law, and so reducible because subscribed by the said Mr. Thomas Lowes, minister, after the defunct's decease. In law its not respected at what time the notary subscribes the writ, but at what time the command was given; for a notary may perform a deed of notary, as in taking a seasine, and yet for some days thereafter may delay the subscribing or extending thereof, because the notarie's words are, *hæc fieri vidi scivi audivi et in notam cæpi;* so that the minister being here in place of a notary, there was no necessity of a present subscribing. But *4to,* To take away all controversy, offers to prove by the oath of the minister and witnesses inserted, that the same was subscribed before the defunct's decease. To which it was duplied for the pursuer, *1mo,* That she shall prove that she is nearest of kin, which is her active title, *cum processu.* To the second its not relevant, *1mo,* Because no mention of the pursuer's name in the testament produced. *2do,* What goods she received from the defender were not in relation to that clause in the testament, leaving her something; but she being nearest of kin, poor and illiterate; and he being a stranger, (though nominated executor to her uncle) and knowing of no such nomination, accepted some things of him, which can never infer a homologation of the said testament. To the last, *non relevat;* neither is the simile taken from a notary to a seasine good; for a testament is not legal except it be drawn up in the defunct's name, *in prima persona,* and not by way of instrument, where a notary speaks in *tertia persona;* so then a testament being a direct deed of the defunct himself, he speaking therein and not the minister or notary, if the said testament, *ex ejus mandato,* be not subscribed in his lifetime, but after his decease, the same is noways legal, but is null, seeing *mortuo mandatore expirat mandatum. Item,* The pursuer being in *libello,* and offering to prove her reason of reduction by the oath of the minister and witnesses inserted; *item,* This pursuit being in favours of the nearest of kin *contra* a stranger; the pursuer ought to have the preference of probation, she being more pregnant, and offering to prove *positivè* that the said testament was subscribed after the defunct's decease.

All which the Lords having considered, they noways found the said testament homologated. Found that part or member of the defender's reply relevant, whereby he offered him to prove that the said testament was subscribed before the defunct's decease; to which effect the minister and witnesses therein inserted are summoned to give their oaths; which they having done, the Lords found their depositions proved the said member referred thereto sufficiently. Whereupon the Lords assoilyied the

defender foresaid from the summons of reduction intended against him, and declared him free therefrom in all time coming.

Act. Mr. Geo. Norvell. *Alt.* Sir George Lockhart, Mr. Alexander Spottiswood.

Signet MS. No. 84, *folio* 32.

1664. *January* 20. JOHN SIMPSONE *against* JAMES HALYBURTON, HELEN STIRLING, JAS. WEIMES, SIR JO. TOURS, WILLIAM TOURS, &c.

SIR ALEXANDER TOURS of Innerleith, as principal, Alexander Simpsone in Innerleith, and Alexander Steill in the Mains thereof, as cautioners, oblige them, by their bond in 1644, to pay to Jo. Simpsone, merchant in Edinburgh, the sum of 4000 merks. This bond Jo. registers in 1645; and inhibits him; which letters and their executions are also duly registered. Then assigns in 1645 the said bond, with the diligence done thereupon, to Robert Urie, writer in Edinburgh; who summons Jo. Tours, son and heir to the said Sir Alexander, granter of the bond, before the bailies of Edinburgh, where he obtains decreet against him; as also before the sheriff of Edinburgh. Then by his retrocession he dispones over the same bond, with the letters of inhibition, and decreet obtained by him, to the same John Simpsone, his cedent; who thereupon comprises the lands of Innerleith; and upon his comprising gets himself infeft. In 1659 Jo. Tours, notwithstanding of this inhibition served against him, by his bond of alienation, sells the lands and barony of Innerleith to Alex. Halyburton, merchant in Edinburgh. Alexander dies. John Simpsone now raises a summons of reduction against Ja. Halyburton, his son and heir, Helen Stirling, his mother, and liferenter of the lands, Mr. James Weimes, parson of Kirkliston, her spouse, for his interest, Sir Jo. Tours, lately of Innerleith, William Tours, father brother, and so uncle to the said Sir Jo. and their tutors and curators, &c. charging them to compear, and exhibit before the Lords the foresaid letter of alienation, or disposition, made by the said Sir Jo. with consent of his said uncle, and dame Jean Ker old Lady Innerleith, to the said Alexander Halyburton, containing the lands under mentioned; Vindeston, the six acres of land called the Slucker-acres, Glegmensie, Wairdiemuire, Hirdshill Coukepill, Cumlebank, Doucot's-croft, Easter and Wester Waltinshots, Easter and Wester Stanks, Easter and Wester Hoggitsheill, Foulfidus and Lovingrass meadows, Pyetshots, Eastern Lugside, the Buts, the four Broom Parks, Wardie-toune and lands, and Craig of Innerleith; to hear and see the same reduced, and declared null *ex capite inhibitionis.* For instructing the summons there is produced the bond; the letters of inhibition duely executed and registered; the decreet obtained against them at Robert Urie's instance; his translation thereof; the decreet of apprising, &c. For satisfying the production there is produced the disposition called for; and it is alleged by the defenders that there could be no process of reduction sustained upon the foresaid inhibition, because the same was only raised upon a dependence. Whereunto it was answered by the pursuer, that he opponed the state of the process, wherein was produced not only the inhibition, but also the decreet that followed on that dependence; so that there is no dependence now.

All which reasons the Lords having considered, they rescinded the said contract of alienation; declared the same to be null; and so reponed and repone the

said Jo. Simpsone, pursuer, *in integrum*, in sick like manner against the same as if it had never been made. Upon the pronouncing of which decreet, William Tours gave in a supplication to the Lords, craving his advocates might have a sight of the said process before extracting of the decreet; to the effect they might be heard upon their lawful defences thereagainst. The Lords, by their deliverance, ordain them to see the process in their clerk's hands; in the mean while stop the extracting of the decreet, whereupon they are heard of new again. Notwithstanding of all their allegeances, the Lords adhered to their foresaid rescissory decreet; only reserved to the said William Tours any right he had to the said lands of Innerleith, before the said inhibition was served.

Act. Mr. William Maxwell, Mr. Thomas Lermonth, Mr. Alexander Oswald. *Alt.* Ja. Chalmers.

Signet MS. No. 88, *folio* 32.

1664. *January* 20. THOMAS HAMILTON *against* GEORGE TURNBULL.

GENERAL Major John Hamilton, son to Sir Alexander Hamilton of Ballincreiff, in 1648 obtains decreet before the Lords of Session, against George Turnbull in Mirrietoune, for L.36 Sterling, in Scots money making L.432. Colonel John dies. His brother, Thomas Hamilton, confirms himself his executor dative and so pursues the said George; and in 1662 obtains a second decreet for the said sum; whereon he charges him with horning: which letters he suspends, because the said first decreet, (which was the ground of the second,) was for null defence, and not compearance, he never being summoned thereto, neither at his own house, nor at the market cross of Edinburgh, pier, and shore of Leith, as being then in England at the engagement; whereas, if he had been summoned he would have alleged, as he does now, that he is content to give his oath that he was never addebted in any sums of money to the said General Major; which would have been sufficient to have stopt the pronouncing of the said decreet. *2do*, Albeit, Mr. David Thoirs compeared for him in the said action, yet he had no warrant so to do, neither could he propone any defences for him (not having had any information;) only he craved a commission for taking the suspender's oath anent the truth of the debt charged for; which though granted, but instead of leading the commission, they extracted the decreet charged upon against the suspender, without his procurator's knowledge; the verity whereof he refers to the pursuer's oath. *3tio*, The suspender has raised reduction of the said decreets; *Ergo*, At the calling of this suspension, there is produced a testificate under Sir Ja. Middleton's hand, bearing the suspender in 1648, the time of the pronouncing the said first decreet, to have been under his command. As to the foresaid reasons of suspension, coincident with the reasons in the reduction, it was answered for the charger; that they opponed the last decreet in 1662 charged on, bearing the said reasons to have been all then proponed by way of defences, and to have been repelled; because Colonel Hamilton having obtained decreet for the same in 1648, the suspender should have craved to [have] been reponed during his lifetime, (who likely might have proven the debt otherwise than by the suspender's oath,) and not now when he is dead; which may seem to

have been done of purpose: but this charger as executor, (it being so long since,) cannot prove it. *2do*, The suspender purges not his contumacy, by alleging he was then in the army, because this decreet was obtained in January 1648; whereas the engagement was not till the July thereafter. *3tio*, As to the testificate, it wants writer's name, and witnesses; *item*, contains a false narrative; *igitur*, ought not to be respected.

In respect of which answers, the Lords found the letters orderly proceeded, ay and while the suspender pay the sum charged for. *Item*, assoilyie the pursuer from the said summons of reduction intented against him.

Act. Suspender, Mr. Nathaniel Fyfe. *Alt.* Mr. Robert Sinclair.

Signet MS. No. 89, *folio* 33.

1664. *January* 19. JOHN MACMILLANE *against* JOHN BROWN of Mollance.

Apud Edinburgh, 19th January, 1664, *licet hic scribatur.*

BY a contract of wadset, in 1648, William Macmillane in Bar, lends to John Brown of Mollance 1000 merks; wherefore Mollance wadsets and dispones to him the lands of Garranton, lying within the parish and barony of Crocemichell, and stewartry of Kirkcubrigh, for the yearly payment to him of 80 merks; always redeemable to him upon payment of the said 1000 merks. John Macmillane, son to the said William, registers this contract; and, upon his decreet of registration, charges John Brown of Mollance, son to the said John, granter of the wadset. This charge he suspends, on thir reasons, 1*mo*, Because the charger in 1658, assigned his brother William to 400 merks of the said 1000 merks; contained in the contract; which assignation was duly intimated to him; and conform thereto, he had paid the said 400 merks, as the [said] William his discharge thereof produced did prove. As [to] the remaining 600 merks, the suspender, by an authentic instrument, taken in a notary's hand thereupon, offers him to prove, that conform to an agreement and condescendence betwixt him and the charger, he made real offer to the charger of 400 merks thereof. As to the other 200 merks, the same is arrested at the instance of two several persons in his hands, as the copies of the said arrestments delivered to him prove; so that, till they were loosed, he could not obey this charge. At the calling of this suspension, there were farther thir eiked reasons added, 1*mo*, The letters ought to be suspended, because, in the contract of wadset, there is a clause of requisition on forty days; but so it is, no requisition was used, at least no instrument produced for proving the same. *2do*, There was at the time of the said contract of wadset, a back bond granted by John Macmillane, the charger's father, whereby he superseded, the exacting of the said 1000 merks from the suspender's authors, during all the days of Rosina Mackantney, the charger's mother's lifetime, and for thirteen terms thereafter; but so it is, the said Rosina died but in 1659, and there are not thirteen terms elapsed since. *Igitur*, the letters must be suspended. *3tio*, The annual-rent must be restricted to six of the 100, which is at eight in the contract. To thir it is answered by the charger's procurators, 1*mo*, That he acknowledges his assignation of 400 merks of it to his brother; and therefore restricts his charge to the remaining 600 merks. *2do*, To the clause of requisition contained in the contract,

he fulfilled the same; for proving whereof, an instrument of requisition, taken in 1658, is produced. And for the annual-rent, craves but six for the 100. *4to*, As for the second eiked reason, (which the suspender's procurators declared they insisted on,) and for the eliding thereof, there is produced a bond of corroboration granted by the suspender, whereby, in 1663, he obliges him to pay to the charger the said sum of 600 merks, (and that notwithstanding of any suspensive clause contained in the said back bond,) betwixt and July next.

In respect of which answers, the Lords, (notwithstanding of the reasons of suspension, both libelled and eiked,) found the letters orderly proceeded; and ordained the same to be put to further execution, ay and while the suspender pay to the charger the sum of 600 merks, whereto the charger restricts his charge, with the ordinary annualrent at six for the hundred.

Suspender, James Brown. *Alt.* Mr. William Maxwell.

Signet MS. No. 90, *folio* 33.

1664. *January* 21. STEVEN TOUCH *against* The TENANTS of Falkland.

IN 1642, William Touch, merchant in Leven, and Christian Cunnygham, his spouse, and the longest of them two in conjunct fee, were infeft in an annual rent of L.80, to be uplifted yearly, furth of the lands of Falkland, that appertained to Jo. Avarie, burgess thereof. Upon the which infeftment William Touch in 1647 obtains decreet before the Lords, for poinding the readiest goods and gear that should be found on the ground of the lands, out whereof the annual-rent is payable; and failyeing thereof, to apprise the ground right of the lands, &c. After this, William dies; and his son George Touch serves and retours himself heir to his father; and, accordingly, in 1654 obtains himself infeft in the annualrent above rehearsed, to be uplifted out of the lands above written. Then George dispones the same to Stevin Touch, skipper in Leven. Conform to this disposition, containing assignation, the said Stevin was infeft in 1659; and thus, as having right, both by disposition and assignation, from one that was both served heir and confirmed executor, he raises a summons for poinding the ground, against the tenants and present possessors thereof. For instructing the summons there is produced William Touch's seasine, with the decreet obtained at his instance in 1647; then George his retour to his father, with his seasine following thereupon; then George's disposition thereof to this pursuer, with his seasine taken thereupon.

It is ALLEGED, by the defender's procurator, That there can be no decreet of poinding of the ground at the pursuer's instance, because no seasine produced for him of the tenements of lands craved to be poinded. *2do*, Though a seasine be produced, yet the same is base, and not clad with possession, and so cannot be respected. *3tio*, The ground cannot be decerned to be poinded, because in the tenements libelled they are tenants to one Martha Blyth, liferentrix of them.

To the first of thir it was REPLIED,—That they opponed the seasine produced. To the second, opponed the decreet of poinding in 1647. *Item*, That they were tenements within burgh. To the third, the same must be repelled, because the said

Martha Blyth is dead two years since; but if she be living, declares that this decreet shall not prejudge her right during her lifetime.

All which the Lords having considered, they ordained the ground to be pointed or apprised; but always with reservation of the said Martha's liferent, if alive.

Act. James Abernethie. *Alt.* Mr. David Balfour, Mr. Thomas Murray.

Signet MS. No. 91, *folio* 34.

1664. *January* 21. Jo. Earl of Haddinton *against* The Relict and Creditors of William Gray of Pittendrum.

William Gray of Pittendrum, merchant in Aberdein, and provost thereof, dies without any body that can succeed to him in his lands or heritages; because he has none of his own body lawfully procreated; and for his father, he was a bastard, and not capable of succession. By reason thereof, his whole patrimony and estate falls in the King's hands, as last heir, heritably, and by privilege of the crown. This, his Majesty, with the advice of Jo. Earl of Crawfurd and Lindsay, Lords Parbroth and Struthers, his Highness Treasurer, Collector of his Majesty's augmentations of his kingdom of Scotland, and Controller of William Lord Bellenden of Brughton, his Depute in the said offices, and the rest of the Lords of Exchequer, grant, gifts, and dispones, to Jo. Earl of Haddinton; who immediately raises summons against Christian Cullen, the relict of the said William Gray, and his creditors to hear his gift declared. *Item*, To see it found that he as donatar has undoubted right to all the goods and gear whatsoever that pertained to the said William the time of his decease, and particularly to thir following; divers tenements, (all bounded,) in Aberdein; three half nets of salmon-fishing in the fords of the water of Dee; *item*, Another net, half net, and the fourth part of a net of fishing in the water of Don; and the Raick of Die, &c. *Item*, That he shall hold them in that same very fashion of the king, as they held formerly, in all their meiths, marches, and bounds, paying the same *blench* or feu farm duties they did formerly. There is produced for instructing the summons, the gift of *ultimus hæres* under the great seal.

It's alleged for the relict and creditors; that no process ought to be sustained at this pursuer's instance in this cause, and that no declarator can pass upon the foresaid gift in his favour; because they offered them to prove, that the said deceased William Gray, his goodsire and goodame, were lawfully married together; and that the said William's father was gotten in lawful marriage, and, therefore, the king cannot be *ultimus hæres* upon the account the said William's father was a bastard; and so the said gift must fall and be of no avail; *Igitur* no declarator.

Which allegeance the Lords finding relevant, they assigned a term to the defender's procurators for proving the same; wherein they succumbed, so that the term was circumduced against them, and decreet given forth, declaring that the said William deceased without any person to succeed him; and consequently that his lands, goods, and gear fell to the king; and that now the same pertain to the pursuer as the king's donatar; and that therefore he ought to be answered thereof; reserving always to the relict and creditors all their lawful defences upon

their several rights, for any debts, provisions, or other obligements whereby William obliged himself to them; only excludes all defences that may be proponed *contra statum personæ*.

Act. Ja. Chalmers. *Alt.* Sir Geo. Lockhart, Mr. David Thoirs.

Signet MS. No. 93, *folio* 34.

1664. *January* 21. THOMAS NOBLE *against* JAMES HALIBURTON.

IN 1662 Thomas Noble, merchant in Edinburgh, is infeft in a tenement of land, lying in Tailfor's close, once belonging to Patrick Wood, merchant there. This seasine is under the subscription of Sir William Thomson, town clerk, and notary thereto. Then he comprises the same from George Hadden, writer in Edinburgh, and is again infeft upon his comprising. Then summons James Haliburton, writer in Edinburgh, as the occupier and possessor thereof, to pay to him, as having right foresaid, the sum of 200 merks yearly, as being that which the tenement pays of maill, before the bailies of Edinburgh. James advocates the same to the Lords. At the calling of the advocation, there is produced for the raiser of the advocation, a comprising of the same lands led at his instance, whereby he claimed right to the mailles and duties thereof. Then compears Margaret Hill, relict of Robert Darling in Queensferry, and craves to be admitted for her interest; who being admitted, produces a bond of corroboration granted by George Hadden, to her and her husband, in conjunct-fee, the longest liver of them two, in 1653, whereby he obliges him to infeft them and the heirs of their body in the said tenement, redeemable always upon payment of 1200 merks, containing a precept of seasing and procuratory of resignation; whereupon resignation being made in the hands of Robert Sandilands, then one of the bailies of Edinburgh, new infeftment was granted to her and her children thereof, as the instruments of seasine and resignation produced also testify; in respect of which writs produced, she craved to be preferred to the whole duties of the said tenement, and to exclude all others, ay and while she be completely paid.

Whereunto it was REPLIED for the pursuer, that he having apprised the said tenement, and so being a singular successor; and her seasine being only on a bond of corroboration of a former simple bond, it can be no farther extended than to the security of the principal sum of 1200 merks, and payment of the annual-rents; and so she ought to be restricted to her ordinary annual-rent.

All which the Lords having considered, they restricted her to the annual-rent of her money, (being liferentrix) and preferred her therein to the other two, to uplift the same, free of all burden. Then *secundo loco*, prefer the pursuer, Thomas Noble, to a proportional part of the superplus of the mailles and duties of the said tenement; and, therefore, ordain the said Ja. Halyburton to obey them therein. Yet, because the said Ja. comprised the said tenement within year and day of the pursuer, ordain him to come in *pari passu* with the pursuer to the said superplus of the mailles and duties of the said tenement, effeiring to his sum comprised for; and so declare him to have just ground of retention in his own hands, of the proportional part of the superplus, &c. he always paying his proportional part of the pursuer's expenses in leading the said apprising.

Act. Pat. Fraser. *Alt.* Jo. Abernethie.

Signet MS. No. 94, *folio* 34.

1664. *June* 18. LORD LIE *against* WILLIAM VEITCH.

IN this case found that the testator's creditors are preferable in law to the creditors of the executor; even though William, who was creditor to the executor, had arrested the sum long before my Lord Lie, who was a creditor to the defunct; in respect the debt was not established in the executor's person by a decreet, and so was not execute. *Advocates' MS. folio* 52.

1664. *July* 1. TURNBULL *against* MINTO.

TURNBULL being his father's third son consents to a disposition made by his mother of a tenement of land belonging to her as heretrix to Minto: which tenement was resigned by the mother before this right in favours of her husband and his heirs. And this Turnbull craving reduction of the foresaid right, by his mother, to Minto, as heir to his father, as done by his mother, after she was denuded;

ANSWERED,—*Esto*, she had been denuded, yet this pursuer consenting to the right, any supervenient right that came in his person prejudges not him, and gives him no interest to quarrel the right to which he is consenting, since in law *jus superveniens venditori accrescit emptori.*

REPLY,—He having no right then standing in his person, and having two brothers living, who would ever exclude him and succeed first, he could not transact or transmit any right but what he had, since *nemo potest plus juris in alium transferre quam ipse habet;* especially considering there was no preceding onerous cause of the said consent: for which Craig was adduced, *Lib.* 2. *Dieg. ult. de conjunctis investituris.* Alleged farther, that his consent in law infers no warrandice, yet it prejudges the consenter, so that he can never evite that right to which he consented. Alleged the right made by the wife must be said to be done in contemplation of a contract of marriage, otherways it would be found to be *donatio inter virum et uxorem*, and so revocable, and revoked by this posterior right made by the wife who was heretrix; now, if a woman may revoke a right as a man may do, is doubted in law. This was debated, but not decided, and was to be heard *in præsentia.*

Act. Dinmuire. *Alt.* Birnie.

Advocates' MS. folio 52.

1664. *July* 20. PATRICK OLIPHANT *against* SIR JO. FLETCHER, the KING'S ADVOCATE.

SIR JO. FLETCHER, his Majesty's advocate, being accused by Mr. Patrick Oliphant, by permission from his Majesty, before the Secret Council, upon misdemeanours and deeds of prevarication committed by him the time of the late Parliament: which was an extraordinary case, founded upon no law written nor consuetude:

and this process had its foundation in the civil law, *T. D. De prævaricatoribus:* where, amongst other pretty debates, this was one, if an advocate, or any other, might be accused of prevarication, *sine quærela partis læsæ*, and that this was rather an inquisition after crimes not known than an accusation, which is not allowed in law against any without some party were lesed. Clarus, *parag. ult. Quæst.* 3. distinguishes betwixt an accusation and an inquisition, and asserts that they cannot stand together; *item*, that there is *inquisitio delicti et delinquentis;* inquisitions after delicts are not allowed, *sine quærela partis;* inquisitions after delinquents are not sustained but where the delict is constant. So Clarus, *Quest.* 4. *Lib.* 5. *Pract. Crim.* Then there is no inquisition after delinquents, but only *in delictis facti permanentis*, as homicide: but *in delictis facti transeuntis*, as is prevarication, there ought to be no inquisition *sine quærela partis læsæ.* It was subsumed, that this kind of process of prevarication against the Advocate, could not be pursued by Mr. Patrick, unless some party wronged by the Advocate were complaining, and concurring with him in the pursuit; otherwise it should be *inquisitio judicis in delictis facti transeuntis sine quærela partis*, which is allowed by no lawyer. The greatest part of the deeds of prevarication ran upon his taking from pannels accused by himself for treason, *pendente lite.* Against thir particulars, alleged, The simple taking was no crime, unless it were libelled *intuitu* of the process, and to desert the diet; and though the diet did desert after his taking, yet it could not be presumed to have been done *ut a lite discederet*, unless it were proven; for it was affirmed, that an advocate might take from a defender (whom he is pursuing,) to be for him in other causes, so as he be faithful to the pursuer in that one particular cause.

ALLEGED farther,—*Quidam actus sunt simpliciter mali, et ex nulla circumstantia boni*, as adultery: *alii simpliciter mali, sed ex circumstantia aliqua boni*, as homicide upon self-defence. *Quidam* ἀδιαφορου, *sed ex circumstantiis boni vel mali*, as *donatio facta a reo advocato partis adversæ.*

This was a most malicious pursuit, and came never to a decision.

Advocates' MS. folio 53.

I procured another Civil Register of Decreets, beginning the 20th of January 1665, and ending the 18th of February 1665.

Signet MS. folio 39.

1665. *January* 20. ANDREW MOIR *against* MARGARET MUILD and MARGARET DAE.

MR. ANDREW MOIR, professor of physic in the burgh of Old Aberdeen, is infeft in a tenement of land lying within the burgh of Perth, in the Venel thereof, called Fleming's Venel. By a precept of warning, forty days before the term of Whitsunday last bypast, he charges Margaret Muild and Margaret Dae, widows, tenants possessors of the said tenement, to remove and flit them and theirs, to the effect he and his tenants may enter thereto. This precept they having disobeyed, and the term being bygone, he summons them before the bailies of Perth, where he obtains decreet against them, decerning them to flit and remove. Upon this decreet he immediately raises letters of horning, charging them to remove within six days after the charge, and that under the pain of rebellion, of ward and imprisonment of their persons, and of ejection of themselves and their goods. This charge they suspend, 1*mo*, Because the said suspenders being both poor widows, and having the charge of many fatherless children, they have lived these twenty-seven years as tenants in the said houses, without any trouble or molestation from any body, but especially from this charger, whose right they never so much as heard of, he never having pursued them for maills or duties, &c. 2*do*, *Esto*, he were heritor of the said lands, whereof they know nothing, the said houses were set to them long ago; and so before this removing, by Jean Lethan, liferentrix of the said tenement, and who stands infeft therein, whom constantly they have acknowledged as master, by payment to her and her spouse, of the maills of the said house. Likeas, at the pronouncing of the said pretended decreet, whereon the letters are raised, the said Jean Lethan's procurators compearing, objected, that no removal could be sustained at this now charger's instance, in respect of the said Jean her standing infeftment; whom, till he did redeem, and so acquire her right, he had no power to remove. Notwithstanding of which defence, the bailies, against all law and reason, pronounced the decreet foresaid, the like whereof has never been seen. *Item*, the said Jean is distressing and pursuing the said suspenders for payment, making to her of the said maills, in respect that she set these houses to them. And, therefore, till such time as the charger purge the said Jean her infeftment, and so secure the suspenders at her hands, he was *in mala fide* to charge them to remove; as also, they can nowise be liable to obtemper the said decreet. But, 3*tio*, They are ready to depone they were never lawfully warned to remove. *Igitur, &c.*

At the calling of this suspension, the suspenders, by their procurator, repeated their reasons above set down: whereto it was answered for the charger, that notwithstanding thereof, the letters ought to be found orderly proceeded, and that he opponed the decreet.

All which being considered by the Lords, they found the letters orderly proceeded; decerned them to be put to farther execution, ay and while the suspenders should remove to the effect the charger may enter, &c.; and that conform to his infeftment and seasing thereupon, precept of warning, decreet, act of Parliament, and custom within burgh.

Susp. Mr. Nathaniel Fyfe. *Alt.* Mr. William Moor, Wm. Lauder.

Signet MS. No. 2, folio 39.

1665. *January* 20. GILBERT GRAY *against* The EARL of HADDINTON, the KING'S ADVOCATE, TREASURER, &c.

WE saw before on the 21st of January, 1664, (*vide supra* page 368,) the Earl of Haddinton (as having got the gift of *ultimus hæres*, or of the bastardy of William Gray, once provost in Aberdein,) obtains decreet of declarator of his gift against the relict and creditors of the said William Gray; in which decreet was reserved to the creditors, all their lawful defences upon their several rights, &c. Gilbert Gray, provost of Aberdeen, finding that the said William was addebted to him in several considerable sums of money, amounting to some 3000 merks, as the bonds granted him therefore did bear; *item*, that he was engaged in cautionry for the said deceased William, in divers considerable sums of money, amounting in all to 18,000 merks, for the payment whereof he was either actually distressed, or at least might be distressed; and the said William being now dead, a bastard, having no lawful children of his own body, neither there being any of his deceased father's body, who in law might succeed or represent the said William Gray, Gilbert could neither obtain decreets for payment making to him of the foresaid sums addebted to him, nor for relief of his cautionaries against any person, as heir, or as lawfully charged to enter heir to the said deceased William, or otherways representing him, whereby adjudications, apprisings, or other legal diligences may be deduced, obtained, or used in the ordinary way, against the estate and means of debtors who are deceased, and who have heirs to represent them: therefore, he raises a summons against the Earl of Haddinton, as donatar, the King's Advocate, for the King's interest, Earl of Rothes treasurer, Lord Bellenden, treasurer-depute, and all others having interest to hear it, (*in subsidium* of other remedies) in all law, equity, and reason, found and declared that the whole goods and gear, both heritable and moveable, of the said William Gray, are and should be liable to him, for his relief and payment of the debts and cautionaries above written, for which he stands engaged, and is distressed; *item*, that the foresaid debts being verified and declared, the said decreet of declarator may be equivalent to a decreet *cognitionis causa*, so that he may use adjudication of the said estate upon it, in the same manner as if the said William Gray had deceased, leaving apparent heirs behind him, which, having been charged by the pursuer to enter heirs, upon their renunciation were decerned *cognitionis causa*. For instructing this summons, the whole bonds, as-

signations, and translations above written were produced. Compearance is only made for the Earl of Haddinton, for whom it is alleged, 1*mo*, That no process can be sustained, at the instance of the said pursuer, against him for the sum of 2040 merks, contained in two of the said bonds; because no translations of them in favour of this pursuer are produced. 2*do*, Albeit the said translations were produced, yet the said defender ought to be assoilyied from the same, because the king and his donatar are not obliged to pay debt. 3*tio*, Albeit they were obliged, (as they are not,) yet the Earl of Haddinton cannot be holden to make any translation of the said defunct's goods or estate, in favours of the pursuer; because he has granted a back-bond to the Exchequer, whereby he obliges himself to be ruled by them, in reference to the satisfaction to be made to the defunct's creditors; and, therefore, the defunct's creditors should make their addresses to the Exchequer, and get their bonds allowed there. 4*to*, Albeit the said bonds are allowed there, yet the Earl of Haddinton nor his estate could not be liable in payment of the said William Gray his debts; but all that can be craved of him is that the Earl grant a right to so much of the defunct's estate as may correspond to his just debt, instructed to be truly resting by him.

Whereunto it was REPLIED for the pursuer, That the first allegeance ought to be repelled, because, 1*mo*, They concurred for the assignees; *item*, offered to produce translations before extracting their decreet. 2*do*, The pursuer is distressed as cautioner, and produces decreets passed against him. To the second, ANSWER,—That the Earl's gift is a gift of bastardy, and not of forfaulture and rebellion, and, therefore, in all equity, must be obliged to pay the defunct's just and lawful debts as if he represented him either as heir or executor. To the third, ANSWERS,—It ought to be repelled, because, 1*mo*, It concerns not the defunct's creditors that the Earl has granted the said back-bond, neither are they obliged therein. 2*do*, When the Earl, as donatar foresaid, shall be called to an account in the Exchequer, it will most justly exoner him to produce decreets legally done, decerning him to pay such sums of money to such of the defunct's creditors. But, 3*tio*, *ex suprabundanti* oppones the bonds produced, marked, and allowed by the clerk to the Exchequer, and recorded in their books. As to the fourth allegeance, are content that the said Earl of Haddinton, and his estate, be free of the said debts, and restricts to the said William his estate; except in so far as the Earl of Haddinton has already intromitted therewith, for which he ought to be liable.

In respect of which answers, the Lords repelled the foresaid allegeances, and, therefore, found and declared the estate of the said William Gray, both personal and real, to be liable to the said pursuer, as his lawful creditor and distressed cautioner for him, in satisfaction to him of the sums of money above written. *Item*, that this declarator shall be equivalent, &c. *Item*, find the Earl of Haddinton as donatar liable for payment of the same, conform to his intromission with the defunct's estate and no farther; and for that effect decern and ordain him to denude himself by assignation or disposition of so much of the said William his estate, in favours of the pursuer, as will pay the sums aforesaid.

Act. Pat. Fraser. *Alt.* James Chalmers.

Signet MS. No. 5, folio 40.

1665. *January* 21. AGNES COLQUHONE *against* WILLIAM WALLACE.

GEORGE CHALMERS of Balbithen, by his bond, obliges him to pay to Ja. Philp, clerk to the Secret Council in King Charles the First his time, and in the bond designed servitor to the Earl of Stirling, the sum of L.30 Sterling. For another debt Balbithen is denounced, and lying year and day thereat his escheat falls, the gift whereof Doctor James Chalmers, physician ordinary to his Majesty, procures of the King. Ja. Philp, as clerk foresaid, making scruple to pass this gift, unless he were secured of payment of his L.30, Mr. William Wallace, advocate of Ileston, now one of the Sheriff-deputes of the sheriffdom of Edinburgh, by his obligation in January 1640, obliges him to cause move the said Doctor Chalmers either to pay the said L.30, or to grant security therefore; and that after the said Doctor should reap any benefit by the said letters of gift, or should obtain possession of the said lands of Balbithen, with the maills and duties thereof. This bond is registered in 1652; and assigned by the said Ja. Philp to Ja. Colquhone, merchant in Edinburgh. Ja. Colquhone dying, his daughter Agnes obtains herself decerned and confirmed executrix dative to her father; and then pursues Mr. William Wallace for payment making of the same to her, upon his bond; because, albeit the said Doctor Chalmers, (and now his son, as heir served and retoured to his father,) have so reaped benefit by the said letters of gift that they have ever been in possession by uplifting of the maills and duties since syne, yet that he has failyied in moving him to pay the same. For verifying the summons there is produced Mr. William's obligation, with the assignation thereto; then the testament dative nominating the pursuer executrix to her father; then an extract of the said Ja. Chalmers of Balbithen, his retour, to his father the Doctor.

Against the summons it was ALLEGED for the defender, 1*mo*, That there could be no process sustained till Balbithen his first bond granted to the said Ja. Philp (wheunto this bond pursued upon relates) be produced. 2*do*, No process, because the condition of the said bond is not fulfilled, for Dr. Chalmers never did get any benefit by the foresaid gift, neither did enter to the possession of the lands of Balbithen by virtue thereof, but by another right.

To this it was REPLIED, to the first, that he was not obliged to produce the first bond; and that the bond produced was enough to instruct this pursuit. As to the second, the same ought to be repelled, because the conditions of the said bond being in *terminis alternativis*, to wit, how soon Dr. Chalmers, or his heirs, should reap benefit by the said gift, or obtain possession of the said lands of Balbithen, in that case the said L.30 Sterling was payable. Now, the pursuer subsumes, and offers to prove, that Dr. Chalmers' heirs are in possession of the said lands; and the pursuer is not concerned whether the said possession be by virtue of the said gift or not, seeing it was arbitary to Dr. Chalmers, being once secured in the liferent escheat of his brother, to make use of the said gift, or of any other title; and his not making use thereof cannot prejudge the pursuer.

The Lords repelled the said allegeances, in respect of the summons and reply; and found the points of the said summons, viz. that the said Doctor and his heirs were and are in the possession of the said lands of Balbithen, by intromission with the maills and duties thereof, relevant; and admitted the same to the said pursuer his probation; and so assigned him a day for proving thereof; and for that effect ordained him to have letters for summoning witnesses, &c. Upon the pro-

nouncing of this interlocutor, Mr. William Wallace did intimate this action to Mr. Alexander Seaton, advocate, as procurator for the said Laird of Balbithen, and protested that he might have recourse and relief against him. Whereupon the said Mr. Alexander craved sight of the process; or if that should be denied him, he protested that all his defences might be reserved as accorded, when any action for relief should be intented by the said defender.

To which it was ANSWERED for the pursuer, that he could not see the process, because neither was he called therein, neither had he any interest.

Which the Lords having considered, they refused a sight of the process to the said Balbithen's procurator, but reserved to them all his, &c. whereupon an act was extracted. In the mean time, the pursuers extract letters of diligence for summoning of witnesses to prove the points of the summons admitted to their probation, who compearing in presence of the Lords, by their depositions, proved the same sufficiently. Whereupon the Lords decerned and ordained the said defender to pay to the pursuer, as executrix foresaid, the sum of L.30 Sterling; assoilyie him from all by-run annualrents thereof; reserve to him his action of relief against Balbithen.

Act. Mr. David Falconer. *Alt.* Mr. William Wallace himself, and Mr. John Cunyghame. *Signet MS. No.* 9, *folio* 41.

1665. *January* 21. SIR GEORGE STIRLING of Keir *against* ROBERT, EARL of ROXBURGH.

ROBERT, Earl of Roxburgh, by his bond in 1623, obliges him to pay to Sir Thomas Nicolsone of Carnock, advocate, 2000 merks. This bond Sir Thomas assigns to his daughter, Dame Anna Nicolsone, then married to Sir George Stirling of Keir in 1642. In 1663, Sir George and his Lady obtain a decreet *in foro contradictorio* for the said sum, against William, now Earl of Roxburgh, as heir, served and retoured to the said Robert, granter of the bond. Dame Anna, his lady, dies. Keir after her decease, charges the Earl of Roxburgh with horning upon the said decreet. This charge Roxburgh suspends, 1*mo*, Because the decreet whereupon the said charge proceeds is obtained at his lady's instance, and his, *jure mariti* allenarly, for his interest; so that after her decease, he could not charge for the said sum in his own name, seeing his interest died with her. 2*do*, The sums charged for belonged to the said Dame Anna the time of her decease, and so fall under her executory; so that the suspender cannot pay the same to any one save her executor, upon confirmation of the same, and upon a valid decreet; and, therefore, the said letters were wrongously execute at the said laird of Keir's instance against the suspender. But 3*tio*, The suspender has raised a summons of double poinding, mentioning that where he is troubled for payment-making of the said 2000 merks, by Keir, as having, or pretending to have right thereto, by virtue of a translation thereof by his lady, who was assigned thereto by her father Sir Thomas; *item*, By Sir Thomas Nicolson of Carnock, son to the said Sir Thomas; *item*, His mother and sisters, as executors, or nearest of kin to the said Sir Thomas, pretending right thereto, by virtue of a clause contained in Keir's contract of marriage with Dame Anna their sister, in their favours; he

summons all the saids parties to hear it declared that he is only liable in once and single payment, and that he is content to pay the same to any of the saids parties the Lords shall find has best right thereto; and so that he may be freed from all molestation at the hands of the others who shall be found to have no right thereto. This summons of double poinding being called, there is compearance only made for the Laird of Keir, for whom and his right, is produced the Earl of Roxburgh's bond, with Thomas his assignation of it on the back thereof, in favours of his daughter Dame Anna; then a decreet obtained at the said Lady Keir and her hushand's instance, against the Earl of Roxburgh, for payment-making, &c.; then his contract of marriage with the said Dame Anna, containing a translation of the said sum in favours of her husband. It is alleged by the Earl (who is pursuer) his procurators, that he could not be decerned to pay the said sum to the Laird of Keir, because he had no right thereto, in so far as in the contract of marriage, wherein his lady transfers to him the right of the said bond, it is expressly provided, that notwithstanding the said translation, if she should decease without heirs of her own body, the same should belong to her brother; but so it is that the said case has existed; *videlicet*, She has deceased without heirs of her body; and, therefore, the right of the said bond does not belong to the Laird of Keir, but to his lady's brothers and sisters, as executors to her in whose favours the provision foresaid is conceived.

To which it was ANSWERED for Keir, defender, 1*mo*, That it was *jus tertii* to the pursuer; and so could give him no right to detain the money. 2*do*, The heirs and executors of the Lady Keir are called in the multiplepoinding, and do not compear, neither produce any right; therefore Keir, compearing and producing a right, ought to be preferred. 3*tio*, *Esto* they compeared and alleged upon the provision foresaid, contained in the contract of marriage, yet the same would be noways relevant, but Keir would be preferred notwithstanding thereof, because Sir Thomas Nicolson, when he assigned the said bond to his daughter, afterwards the Lady Keir, he provided that failing of her through decease, before her marriage, or within year and day after her marriage, without children, that it should accresce or pertain to his son, Sir Thomas: now she in her contract of marriage transferring the right of the said bond over upon the Laird of Keir, her spouse, reserving always to her brother (relative to the assignation thereof made to her by her father) the right of the said bond, in case of failyieing of heirs of her body, or in case of her decease within year and day after the marriage, without children; in which cases, and no otherways, it was provided the said translation in favours of Keir should be void and expire, and the bond should pertain to her brother; and that conform, in all points, to the assignation made by Sir Thomas to his daughter, and the substitution therein mentioned in favours of her brother, and no otherways. But so it is, it is evident by the said assignation made to the Lady Keir by her father, her brother was to have no right to the said bond, except she had died before her marriage, or had died within a year and day after her marriage, without children; but so it is, that none of the saids two cases existed, for she was married, and lived many years after her marriage; so that although by the contract of marriage, her brother's right to the said bond is reserved, in case failyie of heirs of her body, or in case of her decease without children, within year and day after the marriage; yet it seems certain, that the said first case of failyie of heirs of her body has been the mistake of the writer; otherways the second clause, of her deceasing within year and day without child-

ren, &c. would be superfluous, and altogether needless, as being largely included in the first case. And albeit, it may be objected, that *posteriora derogant prioribus*, and so that the clause of the translation should derogate to the clause in the assignation; yet that can have no weight here, seeing the translation expressly provides, that the right of the bond shall only come to her brother, conform to the meaning and tenor of the assignation made by her father to her, and no otherways; so that the conditions of the substitution in the assignation will be our only rule here, for interpreting the translation by; which if it has been otherways framed, the same must, beyond all doubt, have been the error and mistake of the writer allenarly.

Which dispute the Lords having considered, they repelled the allegeance in respect of the answer made thereto; and therefore found the said first case in the reservation of the translation in favours of her brother, to have been the mistake of the writer; and that her brother's right must be understood to be only reserved in the terms and cases contained in the assignation made by Sir Thomas to his daughter. *Item*, Found that the saids cases of her brother's substitution had not existed; and therefore found the Laird of Keir to have only good and undoubted right to the saids bond and sums. And this the Lords decerned partly because of the writs above mentioned produced for the Laird of Keir; and partly because the executors and nearest of kin of the said Lady Keir, being oftimes summoned, and not compearing to show their right; as also Ja. Chalmers as procurator for them having seen and returned the process, refused to answer therein. In respect of all which, the Lords found the letters raised at Keir's instance against the Earl of Roxburgh orderly proceeded; and therefore ordain Keir to be answered of the said sum, as partly found only to have best right thereto. *Item*, discharge the executors and parties from all troubling of the said Earl, as parties found to have no right for aught that is yet seen.

Suspender, Earl of Roxburgh, Sir Peter Wedderburn, Mr. Thomas Lermonth. *Alt.* Mr. Jo. Cunninghame.

Signet MS. No. 17, *folio* 43.

1665. *January* 21. ALEXANDER ETTERSHANKS and JOHN ARCHBALD *against* The EARL of HADDINGTON.

WILLIAM GRAY, by his bond in 1660, obliges him to pay to Alexander Ettershanks, cooper in Aberdeen, L.380. The same William, by another bond in 1654, obliges him to pay to John Archbald, burgess there, the sum of L.248. William deceases, bastard. The Earl of Haddington gets the gift of his bastardy, as before ye have seen in the decreet, Gray *contra* the Earl of Haddington, 20th January, 1665. Him, therefore, thir two creditors pursue, as liable in payment of his debts; *item*, as come *in vice* and place of the said deceased William Gray, and so obliged to perform his deeds and obligements, sicklike and in the same manner as if he had been executor confirmed, or heir served and retoured to him. For, instructing the summons there is produced the said two bonds, both of them allowed and recorded in the Exchequer.

It was ALLEGED for the defender,—1*mo*, No process, because all parties having interest are not called; *videlicet*, the principal Treasurer, and his deputes.

To this it was ANSWERED,—That they opponed the executions wherein they were called.

2*do*, Alleged that the donatar was not obliged to pay debt. 3*tio*, That the defender had granted a bond to the Exchequer already. 4*to*, That the most he could be obliged to do was to denude himself of so much of William Gray's estate, as would satisfy the said two debts.

To thir it was ANSWERED, as you will find in the forecited decreet, Gray against Earl of Haddington.

The Lords decerned the Earl to make payment as ye have there.

Act. Mr. William Moir. *Alt.* Ja. Chalmers.

Signet MS. No. 18, *folio* 43.

1665. *January* 25. SIR ROBERT FARQUHAR of Monie *against* SIR JOHN URQUHART of Cromartie.

THERE is a disposition granted and subscribed by Sir John Urquhart of Cromartie to Sir Robert Farquhar of Monie in 1657, whereby he obliges him to infeft and sease the said Sir Robert in sundry lands, with the teind sheaves thereof, lying within the barony of Craigsintrie and Sheriffdom of Aberdeen; *item*, to make, subscribe, and deliver securities requisite thereanent; *item*, to warrant the same from all wards, releifs, &c. against all deadlie; *item*, from all ministers' stipends, annuities, cesses, &c. and all impositions whatsoever; *item*, to enter him to the possession of the said lands, (which he shall warrant to him as lawful,) and to the uplifting the maills thereof; *item*, to deliver him up the writs and evidents of the said lands. This disposition Monie registers in 1662; and then charges with horning to fulfil the said disposition in all the heads thereof; *id est* to deliver him up the evidents of the said lands; to warrant to him the said lands; to relieve him of some burdens and costs he had sustained; *item*, to refund him some farms and duties uplifted out of the said lands by Cromarty, or his chamberlains. This charge Cromarty suspended on thir reasons, 1*mo*, Because the said was altogether malicious against him, seeing there is not so much as an article or head of the said disposition that the suspender had not four years ago performed and fulfilled to the charger; as he had infeft him in the said lands; he had granted him all securities requisite thereanent; he had given up the evidents thereof; he had entered him to the peaceable possession of the same. But 2*do*, As to the obligement for warrandice, besides that the charge thereanent is general, he was altogether *in mala fide*, to vex the suspender therewith, seeing he neither does instruct nor can instruct any distress to infer warrandice. At the calling of this suspension, it was eiked for the suspender, that the said charger not qualifying any distress, as the truth is he is not actually distressed through the suspender his not implement of any clause of the said disposition wherein he stands obliged, there can be no warrandice pursued for by way of action; much less can there be any charges of horning raised for that effect. The charger's procurator declared that he passed from the suspender's oath, *pro loco et tempore*, and (giving in the special charge after following) craved certification against the suspender for not delivering to the charger of a sufficient heritable right of the teinds; for not purging of the

lands of Middlethrid; *item*, for not delivering of the writs of the said lands: which condescendence being made, the Lords assigned to the suspender a term against which he should upon oath deliver up to the charger the writs of the said lands; *item*, should purge the said infeftment. And as to a valid right of the teinds, the suspender offering a registered contract betwixt the Earl of Errol and the suspender, containing a long tack of the teinds, the charger's advocate took the same up to see; which, after he had seen, having reproduced, he, upon certain reasons, refused to accept of the same as a valid right.

Whereupon the Lords, by their interlocutor, found the said contract did not satisfy the charge; and therefore assigned the suspender a day to produce a sufficient right to the said teinds, whereto he stood engaged by the disposition, with certification, &c. Which they failyieing to do, the term was circumduced against them; and the Lords found the letters orderly proceeded, aye and till the suspender should deliver to the charger a sufficient heritable right of the said teinds; *item*, should purge the said wadset; *item*, should deliver the evidents of the said lands, &c. conform as he stands obliged by the said disposition to the charger.

Suspender, Mr. Geo. M'Kenzie. *Alt.* Mr. David Thoirs.

Signet MS. No. 20, folio 44.

1665. *January* 27. Jo. Logan of Burncastle *against* The Creditors of James Logan of Hills.

James Logan of Hills, having been tutor to Jo. Logan of Burncastle, finds Jo. Logan of Ardmanoch, cautioner to his pupil's curators, that he should, after count and reckoning, make payment of what he should be found to have intromitted with of the estate of Burncastle; and for his cautioner's security, he grants him a bond of relief in 1656, obliging himself to keep him scaithless, and to purchase sufficient discharges from his pupil and his curators, to himself and his said cautioner. Ardmanoch being distressed upon his cautionry, he pursues Hills the principal, upon his bond of relief; and charges him with horning; who suffers himself to be denounced, and lays year and day thereat; whereupon his escheat falls. Burncastle, the pupil, takes the gift of it, and pursues a general declarator thereof. It was alleged, no declarator could be granted upon the said gift, because they offered them to prove that the bond, and sums therein contained, whereupon the same proceeds, were either satisfied, paid, or the charge suspended before the denunciation, and so null, and needed not to be reduced.

Which allegeance the Lords repelled, and would not admit to stop the general declarator; but finding the summons relevant, admitted the same to his probation, which he instantly verified by production of his gift, and horning registered, with the executions thereof. Whereupon the Lords gave forth their decreet of declarator; reserving always to the defenders all their lawful defences in the special declarator to follow thereupon.

Act. King's Advocate, and Mr. T. Lermonth. *Alt.* Mr. Robert Trotter and Thoires.

Signet MS. No. 27, folio 45.

1665. *January* 28. ROBERT JOHNSTON and JO. COWAN *against* ADAM COLQUHON.

ADAM COLQUHON, in Littlesauchie, is addebted to Robert Johnston there, L.93. By another bond, he owes to the said Robert, and Jo. Cowan, equally betwixt them, L.120. Thir bonds they register, and raise letters of poinding and horning thereupon. Which charge he suspends, because, 1*mo*, As to the L.93 [he] had accepted of Alexander Glass of Sauchie, for his debtor therein, who likewise had offered him payment of the said money, which (after he had once accepted of him as debtor) he refused: this he was content to prove by the said Robert, charger, his oath. As to the said L.120, the same is for his duty of the crop, 1644; which, upon a sufficient discharge or re-delivery of his bond, he is content to pay them betwixt and Candlemas next; which cannot be denied him, seeing its good payment when a tenant pays his master once in thè year, according as victual can be sold, and a price got therefore. At the calling of the suspension, it was eiked, 1*mo*, That the letters ought to be suspended as to the L.120, because he had consigned the same in Sir W. Bruce, clerk to the bills, his hands. 2*do*, Because the chargers refused to accept of the said sum of L.93, therefore the letters must be suspended as to the penalty of L.20.

To which reasons it was ANSWERED for the charger; and to the first, that he was content the said letters should be suspended as to the sum consigned, providing the charger get warrant to uplift the same. To the second, wherein its alleged that the chargers accepted Sauchie for their debtor, and yet refused when he offered them payment, the same is only probable by the chargers, their oaths; who being examined thereupon deponed *negativè*.

Whereupon the Lords suspended the letters as to the sum consigned, ordaining the same to be given up to the charger; find the letters orderly proceeded as to the sums not consigned, aye and while they be paid. Suspend for L.10 of the penalty; find them orderly proceeded *quoad* the other L.10.

Suspender, Sir Robert Sinclair. *Alt.* Alexander Munro.

Signet MS. No. 29, *folio* 46.

1665. *January* 28. ROBERT HAY *against* ALEXANDER HOME of Blackburn.

WILLIAM HOME of Suinewood by his bond grants him to have borrowed from Thomas Hay, tailor in the Canongate, seven score pounds in 1624. This bond is registered in 1641; and assigned by the said Thomas to his son Robert Hay, also tailor, in 1654; who now pursues Alexander Home of Blackburn, as son and heir to the said William, granter of the bond, and upon the other passive titles.

It is ALLEGED for the defender, that no process can be sustained upon the extract of the bond, because the same was registered after the decease of the said William, granter thereof, whereunto no procurator could have consented for him, he being dead; and so the same extract cannot prove, neither ought to be respected till the principal be produced. Which allegeance the Lords having considered, they ordained by their interlocutor, the pursuer to condescend upon admi-

nicles, (if he had any) for instructing of the verity of the said bond libelled. Conform to which ordinance, the pursuer's procurator condescended upon that he had an arrestment raised upon the said bond, which is a sufficient adminicle.

This condescension the Lords found not enough; therefore ordained the pursuer to produce the principal bond before sentence.

Which the pursuer doubting how he might do, at the next calling of this cause, the pursuer, in fortification of his said libel, offered him to prove by the defender his oath of verity *simpliciter*, that the debt acclaimed by the said extract was a true debt yet resting; and that it consisted in his perfect knowledge to be so; and that he had promised to meet with the pursuer to take order for payment thereof.

Whereunto it was ANSWERED for the said defender, that he was not obliged to give his oath as was craved, seeing the foresaid summons is not so libelled against him; and unless there were a new summons raised, he is not obliged to answer to these particulars the pursuer would refer to his oath.

Whereunto it was REPLIED, that it was in supplement of his summons, he was content to refer the said points to the defender his oath; *igitur*.

Which the Lords having considered, they, by the act of litiscontestation, find the said points probable by the defender his oath; and, therefore, assign the pursuer a day to warn him personally to compear personally to depone, both anent the passive titles and anent the truth of the debt referred to his oath. Upon which act letters are directed whereby he is summoned, personally apprehended; yet failyieing to compear, he was holden as confest, and decerned as heir to his father, *et aliis nominibus, titulis passivis et alternativis quibus supra*, to pay the said sum. This decreet is twice in the register.

Act. Mr. Lawrence Oliphant. *Alt.* Mr. Rodger Hog.

Signet MS. No. 32, *folio* 46.

1665. *January* 28. ROBERT BAIRD and ALEXANDER ANDERSON *against* SIR ROBERT HAMILTON of Silvertonhill.

SIR ROBERT HAMILTON of Silvertonhill, is charged by Alexander Anderson, merchant in Edinburgh, as cedent, and Robert Baird, bailie there, assignee, to pay L.931 addebted by his bond. He suspends upon that clause of the 62d of King Charles II. his first session anent debtors and creditors; whereby it is provided, that the Lords of Session shall have liberty to grant suspensions to such men as should use the benefit of the said act, provided they were charged for sums within L.1000, and that the Lords saw just reason why they should do the same. But so it is, the suspender has taken the benefit of the said act; the sum he is charged for is within L.1000, and yet it is utterly impossible for him, by reason of his other debts and cautionries, presently to obey this charge without a little breathing time; which the Lords, he hopes, will allow as a sufficient reason of suspension.

It being called, the Lords would not admit the same; but found the letters orderly proceeded, ay, and while the suspender should pay, &c.

Suspender, Mr. Jo. Harper. *Alt.* Mr. Thomas Baird.

3 *Signet MS. No.* 33, *folio* 47.

1665. *February* 1. MARY MELVIL *against* PATRICK YEOMAN.

WILLIAM WEIMES, merchant in Dundee, is addebted to Andrew Melvil, merchant in Edinburgh, and of Pittachop, 1000 merks. Andrew dies. His daughter, Mary Melvil, confirms his testament, and gets herself confirmed his executrix: then pursues Mr. Patrick Yeoman as executor to the said William Weimes, at least as having accepted a disposition from him of his estate, with the burden of his debts, and on the other passive titles. For verifying the libel, there is produced the bond, with the confirmed testament. As to the passive titles, refers them to the defender's oath; who compearing, deponed that he had indeed a disposition of some tenements and acres from the deceased, before his decease; but that the same was for onerous causes, and without any burden of the debts, or promise to pay the same.

The intromission upon this disposition found not to be vitious, neither to infer a passive title; and therefore assoilyied the defender from desire of the libel.

Act. Mr. Roger Hog. *Alt.* Mr. William Yeoman.

Signet MS. No. 35, folio 47.

1665. *February* 2. FRASER of PHILORTH *against* ANDREW FRASER of Stonnilwood.

SIR ALEXANDER FRASER of Fraserburgh, by an irredeemable alienation, dispones, with consent of the Lord Lovat and others, in 1616, to Alexander Fraser of Durres, the lands of Cairnebulge, within Aberdeenshire; whereupon he is infeft under the great seal. Alexander again in 1616, with Simon Lord Lovat's consent, irredeemably dispones the same barony to Andrew Fraser, then of Stonnilwood, afterwards Lord Fraser, goodsire to this Lord Fraser that now is; whereupon Stonnilwood is infeft therein in 1619 under the great seal. But he considering that others had right by comprisings or otherways to the saids land, anterior to his disposition; for his securer joysing of the same in time coming, he gets all the said rights settled and established in his own person, as particularly thir following; he gets a disposition to a comprising led in 1617 against the saids lands, by one Alexander Henderson, with the charters and sasines following thereupon; *item*, A discharge of the legal reversions contained in the saids apprisings granted to Stonnilwood by Fraser of Durres, who again ratifies of new his disposition he had made to Stonnilwood of the said barony. Then in 1621 obtains a decreet of improbation, improving Ogilvie of Dunlegus, Fraser of Fraserburgh, and sundry other persons their rights they might have to the said lands. There was also a comprising led at Forbes of Pitsligo, his instance, against the said lands, who thereupon was infeft under the great seal; *item*, Stonnilwood in 1620, causes be premonished to come and receive his money for which he had comprised, and so to hear and see the said lands redeemed; conform to whilk procuratory and instrument of requisition, Pitsligo compeared and received payment, as an instrument of redemption thereupon made bears, and so grants a renunciation, or grant of redemption in favours of Stonnilwood; then in 1621 obtains decreet of declarator of redemption of the

saids lands against Pitsligo, *in foro contradictorio;* whereupon Pitsligo grants him a renunciation of the comprising, upon which resignation of Pitsligo's he is of new again infeft under the great seal. *Item*, the said Alexander Fraser of Durres, from whom flowed Stonnilwood's rights, was sundry times, and for sundry causes, denounced rebel, and put to the horn, where he lay attour year and day, when his liferent escheat fell in the King's hands, and at his disposition; the gift whereof was given to Forbes of Balnagask; who, by his letters of assignation in 1625, dispones the said gift, with decreet of general declarator, obtained by him to Stonnilwood. Stonnilwood, the acquirer of thir lands, having been at all this pains to buy in all other rights that affected them, dies. His son, Andrew Lord Fraser, serves and retours himself heir to his father, and gets himself infeft in the said barony of Cairnebulge in 1637. He dying, his son Andrew, that is now Lord Fraser, retours himself heir to his father and goodsire, and so procures himself infeft in the said lands in 1651.

Fraser of Philorth pretends a right to the said barony of Cairnbulge, which they derive from Simon Lord Lovat, who was heritable proprietor of the said lands in 1624; sold away the same to Fraser of Fraserburgh; who again disponed them to Fraser of Durres, from whom the now Lord Fraser derives and draws his right. Upon this right Philorth intents a summons of improbation of my Lord Fraser's right to the said lands in 1657; in the improbation he calls for production making to him of Durres (Lord Fraser's author) his seisine of the lands of Cairnebulge; *item*, for the apprising led at Henderson's instance, the right whereof the Lord Fraser had got established in his person; and because the same were not produced there was certification granted by the then Commissioners against them for not production. The Lord Fraser intents a summons of review (conform to the act of Parliament 1661,) of the said certification, wherein he craved the same, as most unjust and unreasonable, to be recognosced, rescinded, declared null, &c. Whereunto he adds a declarator of property, craving thereby, that the Lords would declare him to have the only heritable and irredeemable right to the said lands and teinds; and therefore would discharge the said Laird of Philorth defender, from troubling him therein, &c.

The time of the discussing of this action, it was ALLEGED for the defender by his procurators, that no process could be sustained at the pursuer's instance upon the said summons of declarator of property, on the grounds libelled, *videlicet*, on several apprisings of several persons until they condescended upon the comprisings in special.

Whereunto it was ANSWERED by the said pursuer, his procurators foresaid; that they declared that *primo loco* they insisted upon the Laird Pitsligo and Alexander Henderson's apprisings, which are specially libelled; and upon the said pursuer his own right infeftment, and seasine produced; and that he should produce the grounds of his seasine *cum processu*.

Whereunto it was REPLIED by the said defender's procurators foresaid; that no respect could be had to the pursuer, his seisine produced by him as said is; because the same is improven, and a decreet with certification given out against the same.

Whereunto it was DUPLIED by the said pursuer's procurators; that the reply foresaid ought to be repelled, because the foresaid seisine was not *in rerum natura* the time of raising the summons of improbation, nor yet is called for therein, and so cannot be comprehended in the general words of the decreet; and oppone the same decreet to the reply.

Which said defender's reply and duply, together with the foresaid decreet of improbation, being all heard, seen, and considered by the said Lords; they found that the said Lord Fraser pursuer his seasine was nowise to be comprehended in the said decreet of improbation.

Thereafter it was ALLEGED by the said defender's procurators foresaid; that no process could be sustained at the pursuer's instance, as having right to Alexander Henderson's apprising; because certification is given in against the same particularly, in the decreet of improbation.

Whereunto it was REPLIED by the said pursuer's procurators foresaid; that he had intented an action of relief of that unjust decreet upon iniquity; and opponed the reasons of relief.

Whereunto it was DUPLIED by the said defender's procurators foresaid; that the foresaid decreet of certification stands good till it be taken away.

Which defence, reply, and duply, being also heard, seen, and considered, by the said Lords, they did delay to give answer thereto, and to the said action of declarator, till the said reasons of relief should be discussed; and ordained the said parties to debate therein.

Conform to the which ordinance, the said pursuer's procurators foresaid, having repeated the foresaid reasons of relief; ALLEGED that the pursuer had got wrong by the English Judges, in that particular of the decreet of improbation, granting certification against him for not-production of that apprising of Alexander Henderson's; because the time of the leading thereof being about the year 1616, it was ordinary then, and before the year 1624, when infeftments did pass upon apprisings, to leave the same at the Signet, when the precept was gotten out for the infeftment; and so this apprising being left at the Signet, at the passing of the infeftment thereupon, *in legali custodia*, it was not in the pursuer's power to produce the apprising, especially considering the loss of the registers, and things of that nature. And this defence, without ever calling these who kept the signet, or represented them, being proponed for the pursuer against the certification, was unjustly repelled, notwithstanding the charter under the Great Seal, and seasine thereupon were produced, and above thirty years possession; and repeated and produced a practique, the Earl of Nithsdale and the Laird of Westraw *in anno* 1628, thereanent.

Whereunto it was ANSWERED, by the said defender's procurators foresaid, that an apprising is nothing else but a legal disposition. When a party will not pay his debt, the law allows the Sheriff to dispone the debtor's lands, by the apprising to the creditor for his debt; and as it is absolutely necessary to preserve a voluntary disposition, with the procuratory, and instrument of resignation whereupon infeftment follows under the Great Seal, so it is also necessary to preserve the apprising. As to the old custom and impossibility, it being *in legali custodia*, it was farther answered by the said defender's procurators foresaid; that by the old pretended custom, if any was, yet they used to give in a copy or extract, and to keep another; which if the pursuer have neglected, *sibi imputet*. Likeas the said custom was abrogated before the year 1624; nor does *legalis custodia* maintain a bond or other writ being called for to be improven, from being lawfully improven, if the defender failyie in the production thereof. Was it ever a good defence, to say, it is registered, and the principal is *in legali custodia?* and repeated a practique betwixt the Laird of French and Blenchall thereanent. As for the long possession alleged upon, it is not relevant; though they would say

thirty-nine years; for there is nothing but forty years possession, with charter and seasine conform to the Act of Parliament, can maintain a man. As to the practique, it was answered, *de his quæ non sunt et non apparent idem est judicium*, so when it is produced, it shall be reviewed and answered. Neither can there be such a practique *in anno* 1628, that same being long before altered and innovated as said is. Likeas in this process, there are older apprisings produced, so if that had been the form, to leave them at the signet, how could they have them, they being older?

Whereunto it was REPLIED by the said pursuer's procurators foresaid,—That his reason of review stood yet relevant, notwithstanding of the answer; because there is a great difference betwixt a voluntary disposition made by one, and a legal or judicial sentence, not subscribed by a party; and they repeated a practique, *Lord Cranstoun* against *Turnbull*, where no certification past, for not production of the decreet of forefaulture. And for that, that another copy or extract might have been kept, attour that that was given in to the signet, it is not relevant, unless the defender will say that there was a necessity so to do.

Whereunto it was DUPLIED for the defender; that as a voluntary disposition subscribed by parties, (which is the ground of a public infeftment,) must be either produced, or else the infeftment will fall *funditus*; so a right subscribed by notaries when a party cannot write, or a subsidiary right to an apprising from a messenger, is as necessary to be produced, or else the infeftment is groundless. As to the practique alleged upon it, meets not; 1*mo*, Because it was much circumstantiate with sentencing, denunciation, hanging, as was notourlie known; 2*do*, It is a deed in the English time, and so subject to review, and so can be repute no practique.

Whereunto it was TRIPLIED for the pursuer, that the reason of review stands yet relevant notwithstanding of the duply. As to the act of Parliament, writs subscribed by the parties are only mentioned therein, and acts of Parliament are *strictissimi juris*. *Item*, this question about certification for not production of apprisings being debated before the Lords of Session *in anno* 1628, this same defence was proponed, and found relevant in manner contained in the practique produced in process, whereof there seems there have been two reasons; 1*mo*, Because the charter and seasine had never passed without the apprising, and thirty-six years possession had followed thereupon; 2*do*, Because it was left at the signet in *legali custodia*, and so not in the pursuer's power to produce. And as to the other practique, Lord Cranston *contra* Turnbull, this case is more favourable than that; for here the charter and seasin make out there was an apprising, which was produced to the Exchequer at the passing of the signature whereupon the charter followed: but his Majesty's representation upon Turnbull's forfaulture was and might be granted without any production of the decreet of forfaulture. And farther repeated a practique like this, recorded by the Lord Balmanno, namely, betwixt the *Earl of Mar* and the *Lord Elphinston*, where, in regard of the troubles, it was found there was no necessity of production of their retour, since their service was produced, the defender making faith that he had no more; and speaks of an act of Sederunt to this purpose in reference to Kirklands. And farther added, that Philorth could not now quarrel this apprising after charter and seising had followed thereon with thirty-six years possession; because he had taken an assignation to the order of redemption of the said apprising by the con-

tract *in anno* 1620, whereby he had homologated the same; and so cannot now quarrel it.

Whereunto it was QUADRUPLIED for the defender, that the decreet yet stood just, notwithstanding of the review, and what is added in the defence of it. And as to what is alleged by the pursuers upon the act of Parliament; it is ANSWERED, that the ground of this improbation and certification is not the act of Parliament anent prescriptions, but *jus commune*, whereby it is clear, that any infeftment (unless the grounds and warrants thereof be also produced if called for,) is taken away *funditus*; neither does this case quadrate with the act of Parliament, because there is not forty years possession here. As for the practiques above written, no respect can be had thereto, unless the case were formally extracted with the minutes, records, and interlocutors of process under the clerk's hand; for there may be many practiques hardled up not right disputed, and one altering from another upon several emergents and circumstances. As for the other practiques and acts of Sederunts, when they are produced, they shall get an answer. As for that out of Balmanno anent the retour, it says nothing, because the service is the special evident, and the retour is only the copy. And to Cranston's practique they opponed what was said in the duply above written; *item*, That the decreet of forfaulture was the sentence of a supreme court; *2do*, The notoriety that the person was hanged for that crime; *3tio*, It is evident that the registers and books of justice were abstracted at that time both before and after, &c. As to the triply of Philorth's homologation of the said apprising, because assigned to the order of redemption of the said apprising controverted; first, the said assignation is only to Pitsligo's apprising; *2do*, *Esto*, It were Henderson's, yet the defender when he suspected it to be false, he might not only pass from, but even quarrel the apprising: in respect whereof the decreet is most just, and the certification legally given for not production; especially seeing they have in the same summons a conclusion for reduction *ex capite inhibitionis*.

Before the Lords should give their answer upon the dispute above written, the pursuers craved they might be heard upon the remaining grounds of their declarator of property, *videlicet*, upon Pitsligo's apprising disponed in favour of the pursuer; *item*, upon his real right flowing from the laird of Durres by way of disposition, charter, and seasine following thereupon.

Which the Lords having granted, it was ALLEGED for the defenders,—That no process could be sustained upon Pitsligo's apprising, because it was led against Durres, who had no real right; in so far as, if he had any seasine of the said lands, the same is improven, and so is as if it never were.

Whereunto it was REPLIED,—That this allegeance founded upon the certification granted by the English Judges against Durres' seasine ought to be repelled; and notwithstanding thereof, the summons must stand relevant for declarator of property; *first*, because the pursuer stands heritably infeft and seased in these lands, and has been in possession thereof these thirty-four years bygone, and so having a real right should have a declarator thereof. *2do*, As to the certification against Durres's seasine, who was the pursuer's author, it is not relevant to stay the pursuer's declarator, unless the defender would allege that he has a better right than the pursuer; especially considering, that Durres's right flowed from this Philorth's grandfather, whose deeds he is obliged to warrant, and so cannot now quarrel the want of his seasine.

Whereunto it was DUPLIED for the defender,—That any real right that is extant in

the person of the pursuer was either by Pitsligo's apprising, or by a real right following from Durres: but so it is that both these rights are null in themselves, they being derived from Durres, who had no real right, as not being infeft, because any seasine he had was improven; *at nulla sasina nulla terra*, especially if a right be granted *a non habente potestatem*. As to that that the defender must shew a better right, or else he must not quarrel the pursuer's; since the defender is cited to this declarator, he need not produce a better right to stay declarator, but its sufficient for him to shew that the pursuer has no right: *nam si actor non probat, reus absolvitur*. And the Lords cannot declare it to be his property unless he clear his real right thereto; for seeing all that he produces are dispositions and charters in favours of Durres, and no real seasine in his person, that is only *jus ad rem*, and not *jus in re*, without which declarator cannot pass.

Whereunto it was TRIPLIED by the pursuers,—That there were charters, procuratories and instruments of resignation from Philorth to the laird of Durres, and sicklike right from Durres to the pursuer's predecessors, who thereupon were infeft; which is sufficient for the declarator. *2do*, The defender cannot quarrel Durres his right, because his predecessor did homologate the same by acknowledging Durres to be heritor, by contracting with him in the contract 1620. And opponed a practique betwixt Campbell and Maclean in *anno* 16—.

Whereunto it was QUADRUPLIED for the defender,—1*mo*, That he opponed his reply. *2do*, That any right the pursuer had derived from Durres or otherwise by apprising is still null, being a *non habente potestatem*, seeing he was not seised. Neither need he produce a better right, seeing many things are competent to a defender which are not to a pursuer. And as to the practique it shall be answered when produced.

Which allegeance, replies, duplies, triplies, and quadruplies being considered by the Lords, they repelled the allegeance *hoc loco*, unless the defender propone and allege a better right than the pursuer.

Thereafter it was ALLEGED by the defender; that certification being obtained against Durres his sasine, which is the pursuer's original right, without which he can have no real right, the property of these lands cannot be declared in favour of the pursuer, because the Laird of Philorth stands heritably infeft in the said lands controverted, upon resignation of the Lord Lovat, Lord of Carnesay, Gordon, and Darpersie, who stood infeft in these lands, long before any right made by Durres to Stonilwood; so that the defender having a right in his own person, and in the person of his authors, prior to the pursuer's right, there can be no declarator given, unless it were alleged by the pursuer, that Durres, (Stonilwood's author) had a real, consummate, and complete right in his person, anterior to Lovat, the defender's author, his right; but so it is, the pursuer cannot make it appear that there was any real complete right in Durres's person, or that he was infeft, seeing any seasine he had was improven as false, conform to the certification above written; and condescended that Lovat's infeftment was in anno 1616, anterior to Stonilwood's, which was not till 1619.

Whereunto it was ANSWERED for the pursuer, that the allegeance ought to be repelled, because any right flowing from my Lord Lovat, in favour of the defender, was principally from old Philorth, Sir Alexander this Lord's grandsire, and Lovat was only consenter thereto, and so any right made by him cannot be respected, because he was formerly denuded in favour of Durres by a resignation. Likeas Lovat is a consenter also in the right to Durres, and therefore could not thereafter dispone to Philorth. And any right Lovat had was

only in security of sums of money paid by him, by getting a proportion of land. *2do*, The defender cannot quarrel the want of Durres's seasine, because the defender is successor *titulo lucrativo* to his grandfather Sir Alexander, who made and granted right to Durres, whereunto the pursuer has now right in manner foresaid; so that if his said grandsire were in life, he could not stop this declarator, if the same was pursued by Durres, upon pretext that he was not infeft; so neither can this defender, who is *eadem persona*, at least representing him, stop this declarator, and condescended that this Philorth did represent his grandfather, *1mo*, by intromission with the mails and duties of the estate of Philorth, wherein his grandfather died infeft; *2do*, He was successor to him in accepting an assignation and nomination in and to a clause of the contract *de non vendendo et vendendo, in annis* 1615 and 1616, and therefore has intented action of reduction against the pursuer, and so has made use of the same. *3tio*, There is decreet already pronounced against him as successor *titulo lucrativo* to his grandsire, at Nicolsone's instance.

Whereunto it was REPLIED for the defender, *1mo*, Albeit Sir Alexander had been in life, and Durres also, yet without a seasine, Durres could never pursue his action of declarator of property. But *2do*, The defender denies he represents his grandfather as heir: and as to the intromission with the mails and duties, it was *singulari titulo, videlicet* by a right flowing from Carnusie, who stood infeft in these lands, and had undoubted right thereto. To the second part of the condescendence, that he accepted and made use of an assignation from his grandsire; it is answered, that by the law of this land to make one successor *titulo lucrativo*, there are two things requisite; *1mo*, That he be *alioqui successurus*, and that *et tempore mortis, et tempore dispositionis*. *2do*, That he who gets the right *faciat lucrum* by the right, in none of which cases the defender was; for neither the time of the making the said right was he *alioqui successurus* or apparent heir, because this suspender's father was then in life, and not only apparent heir, but surviving him fifteen years, and *de facto* was heir served and retoured to him; so that the defender was neither apparent heir, nor *alioqui successurus*, nor could he be heir to him, he being only oy, and his father served heir; instanced in the case of a father disponing his estate, or any part thereof, to his daughter, where he had no sons for the time, but yet a son born thereafter; of disponing a part of his estate to his son, the third yet being in life, but dying immediately thereafter, without succession; could any of these be convened as successors *titulo lucrativo*? No, surely, since they were not both apparent heirs, the time of the disposition and the time of the father's death; and repeated the practique *Hamilton* contra *Farlan*, the last Session. *3tio*, The defender cannot be reputed successor *titulo lucrativo* by acceptation from his goodsire of a right to the said contract and clauses thereof, unless it were alleged that he had made profit and advantage thereby, which cannot be said unless he prevail in his reduction, and be assoilyied from this declarator; and the pursuer is in *pessima fide* to allege the defender to be successor upon that head, seeing in this very same process he craves the prices of the said to be in his favour, declared free of any action, intented or to be intented by the said defender upon these clauses; and therefore, except it were alleged that the defender accepted and made use of a profitable and effectual right from his goodsire, without onerous cause, he ought not to be repute and liable as successor *titulo lucrativo*.

Whereunto it was DUPLIED for the pursuer,—That there was a great difference betwixt descendants *in recta linea*, and *in linea collaterali*; and although

amongst brethren the case might hold, yet the father and son being in the direct line descendant, they ought to be repute as one person, otherwise great inconveniences might follow to the lieges, if goodsires might dispone their estates to their oyes, in preference to their sons and creditors; instanced the practique betwixt the Lady Swinton and her oy, the Laird of Swinton, wherein a disposition being made by the goodsire to his oy, of his estate, without any onerous cause, the oy was found successor *titulo lucrativo*, and so forced to fulfil the lady's contract of marriage; nor needs the pursuer debate whether the defender was *hæres immediatus* or *mediatus*; it is sufficient that, as oy, he was *hæres apparens*, and got the right without any onerous cause; especially seeing its presumable that the goodsire and father did concur in the design to settle the estate on the oy, being then eldest, and *hæres apparens*. And as to that that the father was heir, served to the goodsire, it is not relevant, unless they allege special heir, and infeft in the lands controverted; otherwise a factor might be general heir, and uplift the moveable heirship, and yet not enter to the heritage, in prejudice of creditors: opponed the law of the land, introduced in favour of creditors, whereby, if a son make use of the least of the heirship goods, it makes him liable to all his father's debts; nor does law require *in titulo lucrativo quod lucrum cæpit*; but where the cause of the disposition is not onerous but for love and favour, so that if any oy have accepted a right from the goodsire, for love and favour, without any onerous cause, and made use thereof, he must be repute successor *titulo lucrativo*; much more in this right made to the oy, in defraud of Durres, *inter conjunctas personas*, and so reducible by act of Parliament. And, albeit he cannot be repute *simpliciter* successor *titulo lucrativo*, yet he must so represent him, as he cannot stop his declarator no more nor his goodsire could do if he were in life.

Whereunto it was TRIPLIED for the defenders,—That they opponed the former answers; and farther alleged, that *successio titulo lucrativo*, is of its own nature conformable, seeing thereby if an heir did but accept of one chalder of victual from his father, without an onerous cause, he would be liable for his father's debts, preceding his right, were they never so great; and all laws and customs, especially in *materia dura et odiosa*, being *stricti juris*, admit of no extension. And the distinction made by the pursuer, of descendant and collateral succession ought not to be obtruded, to put the case in hand without the reach of law; seeing, by the law and custom of Scotland, as is clear by Balfour, Hope, Durie, and especially Craig, *Dieg. de successionibus*, it is not controverted whether, to make a man successor *titulo lucrativo*, he must be *alioqui successurus et suus immediatus hæres*, or no. And the distinction of collateral and descendant succession in this case, is neither warranted by law nor authority of doctors, nor by the shadow of any practique in this kingdom, except the practique adduced; which as it was singular, so is far different from this case, and cannot invert the course of law; for he not being *suus*, but *extraneus hæres*, he cannot be said *capere hæreditatem suam vel præcipere*. And as the defender could not be quarrelled, as intromitter with heirship goods, or rents of land pertaining to his goodsire, his father being in life, so neither can he be convened for accepting the said disposition, specially seeing his father was served heir to his goodsire: nor needs there a special service, seeing the right itself falls under general service; and so *per rerum naturam* the defender could not be heir, and so *nec successor titulo lucrativo*. 2*do*, *Titulus lucrativus* being only a subsidiary passive title, introduced where other passive titles are wanting, and as no intromitter can be liable, or con-

vened, where there is an executor confirmed; and none behaving himself as heir, where there is an heir served and retoured; and so none can be called as successor *titulo lucrativo*, where there is one served and retoured, as in this case, because the penal and passive title which makes the defender liable to his goodsire's obligements ought not to extend beyond the conception of the law. As to the practique it noways meets, because the goodsire survived the father, and the right was of the whole estate; the pursuer was Swintone's lady, for her liferent, conform to her contract of marriage, which is a most favourable pursuit; but here not only did the father survive the goodsire, but was served heir to him, and the estate is inconsiderable, being only the reversion of fifty chalders of victual, upon payment of L.38,000; and is not as yet become an effectual right, neither ever yet got he benefit thereby. As to the inconvenients deduced, they ought not to be respected, because successor *titulo lucrativo*, is only liable for debts prior to his right, and such debts cannot be defrauded, because they will be either liable on that title, or else they will reduce on the act of Parliament, as made *inter conjunctas personas*. And as to that, that it is sufficient that the defender accepted the said right, without any onerous cause, though *non præcepit lucrum*, its TRIPLIED, that *lucrum* is naturally implied in that title, for it is not a universal title, as behaviour as heir, or intromitter, but a partial passive title, and liable to debts preceding the right, in respect of the profit had thereby. As for the allegeance, that the accepting of this right should make the defender, in so far at least successor, as not to stop this declarator, no more than his goodsire could do; its answered, that if the defender had formed any allegeance upon any right made to him by the goodsire, for stopping the said declarator, the pursuer would have some ground; but seeing the defender's exception flows from my Lord Lovat, he ought not to be debarred from the benefit of the law, upon the pretext, as though he were successor *titulo lucrativo*, though it is evinced by what was formerly said, that he neither is, nor can be legally heir. And as to the act of Parliament anent rights *inter conjunctas personas*, when the pursuer shall insist upon that head he shall get an answer. Likeas, this deed is before the act of Parliament. And to the third part of the condescendence, that he was successor *titulo lucrativo* by a sentence obtained by Nicolsone, it is denied; yea, on the contrary, he was by interlocutor assoilyied, and so Nicolsone took up his process. And though there had been such a sentence, yet being in the English's time it cannot be looked upon as a practique; in respect of all which no declarator can be granted.

All which dispute the Lords having considered, having perused the minutes, they called the parties and desired the defender to condescend from whom his right followed, who declared his right alleged on did flow from the Lord Lovat, who had recovered an assignation to an apprising led by Pitsligo against old Sir Alexander, the defender's goodsire, and also from Carnusie.

Whereunto it was REPLIED for the pursuer,—That any right Pitsligo or Lovat had to these lands, was only an apprising of 54,000 merks, which being paid to Lovat (having right to the apprising by assignation,) by the price of the lands of Innerlochie sold to and accepted by himself for the sum of 32,800 merks, and 18,000 merks paid further by Durres for the lands of Innernorth, and 3500 merks paid by Philorth, which completes the said sum of 54,000 merks; and so the apprising being paid, became extinct, and could not be disponed thereafter by Lovat to the defender; especially all these transactions being clear and notour to old Philorth, who was party contractor and consenter with Lovat *in uno eodemque*

contextu, both in the contracts 1615 and 1616. And as to Carnusie's right, it is not relevant, because there is a certification granted against the same, at the Lord Fraser's instance, in 1621.

Whereunto it was DUPLIED for the defenders,—That the reply foresaid ought to be repelled, unless the pursuer will offer to prove that Lovat had legally and formally renounced the said apprising, and that the renunciation was registrate; otherways any person seeing Lovat infeft under the Great Seal were *in bona fide* to take rights from him, and clothe themselves therewith: for as a wadset right is never taken away without a legal renunciation and registration thereof, so neither an apprising, which is in effect a judicial wadset, while the debt be paid, renounced, and registered. And the defender is not contractor in the contracts 1615 and 1616, neither could he, he being then minor, yea, within the years of pupillarity.

Whereunto it was TRIPLIED by the pursuer,—That there is a great difference between a wadset and an apprising, both as to the manner of the constitution and manner of their dissolution; for by intromission, before the legal expire, it is declared that an apprising may be satisfied; and this is not only to be understood of intromission with maills and duties, but otherways *quocunque modo*, it extinguishes the apprisings, and the defender was in *pessima fide*, to take any right from Lovat, since he knew he was paid, and was contractor in 1615; which being all *in unico contextu*, he cannot be heard to allege ignorance. Neither does the act of Parliament, ordaining renunciations to be registrate, mention renunciations of apprisings; likeas this payment alleged was *in anno* 1615, whereas the act of Parliament was not while 1617.

Whereunto it was QUADRUPLIED by the defenders,—That they opponed their former duply; and added that apprisings must either be paid by intromission with the maills and duties before the expiration of the reversion, conform to the act of Parliament, which (as all acts) is *strictissimi juris*; or else the translation or renunciation thereof must be registered, conform to the other act of Parliament; for though it mention not renunciations of apprisings, yet it speaks of all renunciations in general, and ordains them all to be registered, that parties may be put in *mala fide*. Which not being done, the defender was not *in mala fide*, but might very well take a right from the Lord Lovat.

Which declaration, reply, duply, triply, and quadruply, above written, being seen and considered by the said Lords, they repelled the allegeance in respect of the reply, bearing that Pitsligo his apprising was extinct, by payment and satisfaction made, either by money, or by accepting of land before the expiry of the legal reversion thereof. And that apprisings differ from wadsets either proper or affected with back-tacks, and so that apprisings need no legal renunciation; and assigned to the pursuer a day for proving of the said reply. At which day the pursuer produced the foresaid two contracts in 1615 and 1616, for proving thereof. Which being seen by the defender's procurators, it was alleged by them that they proved not the reply, because the apprising alleged upon was dated in 1609, and the Lord Lovat's right thereto is not till 1617, which is more nor seven years thereafter; but so it is, that he could not be paid before he had a right to the same. Whereunto it was answered for the pursuer, that though the apprising be in 1609, yet by the contract 1615, the Lord Lovat obliges him to recover a right to the said apprising, and thereupon accepts satisfaction for the same; and therefore is as sufficient as if he had then been really paid in downtold

money. Likeas *de facto* there were 20,000 merks paid at Whitsunday 1615, the pursuer craved that the Lords would peruse the said contracts, and this they repeated in *modum probationis.*

Which dispute the Lords also having considered, together with the writs produced for the pursuer, they found the reply above written, upon the points of the said summons, sufficiently proven by the contract and remaining writs foresaid produced for the pursuer; and therefore repelled the allegeance founded on the defender's right, as flowing from Lord Lovat; and gave forth their decreet in manner underwritten. They find and declare, that the irredeemable right of property of the said lands, barony of Cairnebulge, &c. comprehending such and such lands, &c. with the teinds, pertain and belong to the pursuer; and that the same is established in favours of the said pursuer, as heir by progress to the deceast Lord Fraser, his goodsire: and, therefore, the said Lords discharge the said defenders from all farther troubling, pursuing, or anyways inquieting the said pursuer, in his said right of the said lands in all time coming, &c.

Act. Sir John Fletcher, king's advocate; Sir Peter Wedderburn of Aberlady; Mr. Robert Sinclair, Mr. George Norvell, Mr. Andrew Birnie, Mr. George Mackenzie, and Sir Thomas Wallace. *Alt.* Sir Jo. Nisbett, now king's advocate; Sir Jo. Baird, Mr. Jo. Cunnynghame, Sir Geo. Lockhart, Pat. Fraser and Ja. Brown.

The dispute is most incorrect in the register. Da. Dick.

Signet MS. No. 40, *folio* 48.

1665. *February* 4. WALTER OGILVY of Boynd *against* The EARLS of FINDLATER, AIRLEY, and HADDINTON, SIR PATRICK OGILVIE of Inchmartin, LORD BAMFF, and OTHERS.

IN *anno* 1626, the lands of Boynd, belonging to Pat. Ogilvie of Boynd, falling in ward through the heir's non-age, the same are disponed by the king to the Lord Bamff. He, by his assignation, constitutes Ja. Earl of Airley, donatar thereto; who, by virtue of the gift and assignation thereto, intromits with the maills and duties of the whole barony or Thanedom of Boynd, from 1626 exclusive to 1636 inclusive. Then the heir, Walter Ogilvie, calling the said Earl to an account for his intromissions, there is a submission condescended to by both parties, wherein Thomas, Earl of Haddinton is oversman. Upon it follows a decreet arbitral, in March 1637; conform to the tenor whereof the said Laird of Boynd grants a discharge of their whole intromissions with his living, during his minority, to the said Lord Bamff, and Earl of Airley his assignee; *item*, grants discharges to Ja. Earl of Findlater, Lord Deskfoord, and Sir Pat. Ogilvie of Inchmartin, his curators, of their intromissions and tutor counts. Then for 19,000 merks lent him by the Earl of Findlater, he wadsets to him the lands of Over and Nether Dollachies: *item*, for 50,000 merks alleged borrowed from Inchmartin, Boynd wadsets to him the manor place of Boynd. Both thir contracts are in 1644. Upon thir wadsetts, having once used horning and denunciation, the Earl of Findlater, made assignee to Inchmartin, in 1649 apprises Boynd's lands, and is thereon infeft. Boynd raises a summons in the English time against Earl of Findlater, Earl of Airley, Earl of Haddinton, Inchmartin, Lord Bamff, and others, for ex-

hibition of the said decreet arbitral in 1637; of the discharges and acquittances following thereupon; of their tutor counts, the grounds, and instructions thereof; of the said two contracts of wadset, with the letters of horning, denunciation, and apprising; and the charters and seasines following thereupon; to be seen and considered by the said commissioners, to be reduced by them; to be declared to have been granted by the said Laird of Boynd *dolo malo*, in relation to the unjust and unreasonable tutor and curator count; and, therefore, that the saids defenders ought to count and reckon with him for their intromissions *de novo et ab initio: item*, that they (after count and reckoning) may be decerned to restrict their bonds, comprisings, infeftments, &c. to such sums as shall be found truly resting to them by the pursuer; and that during the dependence of this action, they may be decerned to desist from troubling the pursuer with horning or personal execution. At the calling of this action there is in 1657 a commission granted to Mr. Laurence Oliphant, David Heriot, and Robert Burnet, advocates, as auditors, to hear the said count and reckoning, and to report; who upon trial by oath of parties, writ, and witnesses, found, that by result of the last count fitted in 1636 and 1637, the Earl of Airley was addebted to Boynd in L. 3,338, with annual rent from Martinmas 1639; and that, in respect the said Earl intromitted with the rents of the Forrestlands appertaining to Boynd, which fell not under the gift of the ward. Thir auditors again, with consent of both parties' procurators, grant a subcommission to Hary Elphinston of Calderhall, Urquhart of Dumlitgus, and Mr. William Stewart of Oxhill, to take the depositions of some witnesses anent the true rental of the estate of Boynd, and other articles; who also made their report. At both which commissions the said Earl of Airley, by his procurators, protested, that he should not be put to count and reckoning again *de novo*. This action of reduction and compt and reckoning is wakened in 1662; and Sir Robert Nairn of Strathurd, is appointed by the Lords to consider the reports made upon the foresaid acts of commission granted by the English Judges. After which the cause being called, the pursuer's procurators declared that *hoc loco* they insisted against the Earl of Airley allenarly; and craved sentence conform to the report given in by Mr. David Heriot, &c.; desired the Lords would advise the same at their convenience.

Whereupon it was ALLEGED for the Earl of Airley,—That, after a great count and reckoning amongst the whole friends of the said Earl and the Laird of Boynd, and a submission betwixt them, and decreet following thereon, and a discharge of all intromissions on that decreet; till all which be taken away by reduction, the said Earl cannot be made to count; neither is he libelled against in the principal summons; so that an act of count and reckoning against the said Earl, being both illegal and unjust, cannot be advised.

Whereunto it was REPLIED for the pursuer,—That they quarrelled neither the discharge proceeding upon count and reckoning, nor the submission whereon proceeded the decreet arbitral; but in so far only as Airley was liable to count for several articles contained in the additional charge given in, in this count and reckoning. *2do*, For the particulars contained in the Earl of Airley's back-bond, at the receipt of the foresaid discharge, which he thereby was bound to instruct. *3tio*, For intromissions since the alleged discharge, and so not included therein. So then the foresaid report craved to be advised, being founded on these particulars clearly proven, should be advised by the Lords after so long a delay.

Which allegeance and reply the Lords having considered, in 1663 they remitted the process to my Lord Lee, to consider and report what he found. Who, making no report, in 1664 its again called; and the Earl of Airley, having repeated his former defence, added, that he could neither count for bygones, nor for the additional or subsequent articles; because the summons whereon the pursuer insists, was only a reduction of some discharges, granted by Boynd to Airly, Findlater, and Bamff, *ex capite minoris ætatis* when he granted them; and only an extraordinary clause of count and reckoning, (notwithstanding of thir discharges yet standing unreduced,) subjoined; which as the same is most unusual and illegal, so Airley is only cast in by the bye; so that the act of count and reckoning should never have been extracted, nor the report following thereon been extended, *quoad* him. Likeas the said report was carried on *viis et modis*, and the defender damnified thereby. But to show how ready the Earl of Airly is to clear the business betwixt the pursuer and him, he is content of new to count before any of the Lords, providing no respect be had to the foresaid report.

Whereunto it was REPLIED for the pursuer,—That they repeated their former declaration and desire; *videlicet*, That they insisted not *hoc loco* for a reduction of the foresaid discharges *in anno* 1637; but on Airley's intromission with the rents of the lands, mentioned in the report made by Messrs. David Heriot, &c. as are not included in the said discharge; *2do*, To count and reckon conform to the back-bond foresaid, given by Airly at the receipt of the said discharge; *3tio*, For his subsequent intromission since the date of the said discharge, and other articles of the said report; which the pursuer craved might be advised, since all that could be said, was already said and discussed therein *parte comparente*. And as to the overture of a new count and reckoning, its replied, 1*mo*, That the same could not be, after the loss of so much time and charges. *2do*, There were many witnesses adduced for probation of the particulars above written in the said report, who are now dead. *3tio*, Many papers and evidents are lost. *Item*, Airley, being an old man, may die.

Which dispute the Lords having considered, notwithstanding of the discharge in 1637, they recommended to the Lord Strathurd to consider the report made in 1657, in so far as concerns the three particulars insisted on by Boynd. *Item*, ordained the parties and their procurators to compear before the said Lord auditor at such diets, as he should appoint them; and him to report. He having heard them, and being ready to give in his report of what he had heard and found, the parties' procurators being called in before the Lords, it was of new alleged for Airly, that no process could be sustained against him, on the foresaid summons of reduction, for count and reckoning, because the same is a clear summons of reduction, and a clause of count and reckoning is only cast in by the bye. To which it was answered, that the libel stands good for count and reckoning; it being expressly libelled therein, there being auditors appointed thereon, both in the English time and now; and to cast the progress of the count and reckoning for that, were iniquity, and an endless labour. *2do*, That the commission directed for empowering the former auditors, Mr. David Heriot, &c. was only to state the count betwixt Findlater and Boynd, and not betwixt Boynd and Airley, conform to his protestation foresaid, made at the entry of the said count and reckoning.

ANSWERED,—The same ought to be repelled; and that in respect of the report, bearing the commission, and the express words thereof. As to the protestation, the same is *contraria facto*, the said Earl compearing, and making up his discharge in

the said count and reckoning, and so behaving himself as formally a party therein. 3*tio*, Alleged, that the report made by Mr. David Heriot, &c. cannot be respected, because the same proceeded on their subcommission they granted to Calderhall, Dunlugas, &c. for taking the oaths of parties anent sundry articles, which they had no power to do; *delegatus enim non debet delegare.*

ANSWERED,—Allegeance ought to be repelled, in respect of the said subcommission was granted with consent of all parties or their procurators. Yea, Airley acknowledged the same, by giving procuratory to Pat. Stewart, to compear at the day of compearance contained in the said subcommission, to object against the witnesses to be led; as appears by an instrument taken in a notary's hands by the said Pat. which is so far from being a dissent, that, to the contrary, it is a homologation of the same.

ALLEGED,—That the auditors could not decern annualrent for the sums decerned due in their report; because the said Earl being only an assignee to the ward and marriage of the said laird of Boynd. *Item*, there being no *usuræ debitæ*, but *ex pacto*, the said auditors did wrong in decerning of the same annualrent.

ANSWERED,—That Lord Bamff, cedent, and Airley assignee, being bound by their bond to his Majesty's treasurer to make the ward furthcoming for the said W. Ogilvie of Boynd his own use, were in law *quasi tutores*, who are liable for annualrent, seeing the minor's stock should not be idle and useless. Likeas in the last count and reckoning they did get allowance of annualrent for the superplus of what they had expended yearly.

Then it was ALLEGED for Airley,—That there could be no count and reckoning for particulars preceding the said count and reckoning, and discharge granted thereon in 1637; because the said discharge could not have been reduced, but *intra quadriennium utile*. But so it is, the said *quadriennium* is elapsed and no reduction intented.

ANSWERED,—That Boynd is not to reduce that discharge; only craves count and reckoning for what is omitted in the first count and reckoning that was made before the Lord Innerpesser and Sir Patrick Hamilton; and for the articles not instructed in the said count, which Airley was bound by the same count to do; and for three years' intromission after the said count: which three particulars are not taken away by the said discharge, and therefore Airley should now account for the same.

Whereunto it was DUPLIED for Airley,—That all controversies anent his intromission with the estate of Boynd being formerly submitted to the then Earl of Haddinton, he, by his decreet arbitral, decerned Airley free of all intromissions had with the said estate *quocunque modo*.

To which it was TRIPLIED,—That the allegeance founded on the decreet arbitral cannot now be received, unless it were instantly verified and instructed; in respect that, by the late commission, Airley was ordered to produce all his papers he intends to make use of, with certification, if he did it not, the same should be holden as produced; and thereafter that he should not be heard to allege or produce any thing thereanent.

All which dispute, with the report of the Lord Strathurd, being heard by the Lords, they repelled the foresaid allegeances, in respect of the answers made thereto, and gave forth decreet in manner underwritten. Ratify and approve the report made by Mr. David Heriot, &c.; decern conform thereto, Airley to pay to Boynd L.3338, with annualrent from 1639; and thus unless Airley produce the decreet arbitral betwixt and such a day. At which day Airley, by

supplication, meins himself to the Lords; deduces the dispute; then shows he cannot produce the said decreet, the same being a common evident to Boynd, Bamff, and himself, and so either in Boynd's hands, or at least in the auditor's to whom it was given up. The Lords ordained Boynd's procurators to see this bill, and to answer; who gave in the answer following:—That the desire of the foresaid bill was most unjust, to crave a term to prove that all intromissions before 1637 were discharged seeing that is not the thing Boynd now insists on, but on the three particulars before mentioned. *Item*, Airley proponing the same defence before the Lord auditor; it being answered that it was not *ad idem*, the auditor most justly found that the foresaid decreet arbitral and discharge did not comprehend these articles now acclaimed; yet being ordained to produce the same, they so failyied therein that the term was five or six times conditionally circumduced against them; so that it were most unjust now, after fourteen years' dependence, to stop Boynd's decreet, on pretence of the said decreet arbitral, which they of purpose have kept up because they know it will not be the article insisted on.

Which answer the Lords having considered, they adhered to their former interlocutor; and ordained the decreet to be extracted, unless the Lord Strathurd should see cause to delay the same, or to discharge the clerk for that effect. Whereupon Jo. Ogilvie, (I take it to have been Jean D'Orleans,) gives in a new supplication, shewing that the Lords have approved a report made in the English time, which was allenarly before answer, and wherein all Airley's defences were reserved to him; that Airley is very deadly sick; his son, the Lord Ogilvie, is at London; his advocate has no information; therefore for a time entreats the Lords would forbear to advise the said report.

Notwithstanding of which supplication, the Lords ordained the decreet to be extracted, superseding execution thereon till December 1665; and if betwixt and then the decreet arbitral alleged upon be produced, then the Lords ordain Airley to have suspension of this decreet without caution or consignation.

Act. Sir Peter Wedderburne, Mr. Jo. Cunningham, Pat. Fraser. *Alt.* Sir Thomas Wallace, Sir George Lockhart, Mr. David Falconer.

Signet MS. No. 47, fol. 53.

February 4, 1665. THOMAS FRASER'S DAUGHTERS *against* RENTON of Lamberton.

IN 1650, the Earl of Hartfield, (now of Annandale,) Home of Plenderghast, Home of Blaisterton, and Renton of Lamberton, oblige them to pay to Thomas Fraser merchant in Edinbugh, 8000 merks. In 1656 he gets a decreet against them for the same. His daughters, on this decreet, charge Lamberton's son therefore. He suspends, 1*mo*, Because he, being a minor, scarce yet fourteen years, must have the privilege of the law granted to minors; that is, that the letters must be suspended as to all execution against his person, that he be not hindered in his education at schools and colleges during his minority. 2*do*, The suspender and his *correi debendi* have taken the benefit of the act of debtor and creditor; and, conform thereto, have paid the chargers a year's annualrent

of the said principal sum, whereof also they have granted discharge; which they refer to the charger's oath. *3tio*, Its piked in the margin, that the decreet, whereon the said discharge did proceed, is null, in so far as the same was given without any manner of probation; there being only a registrate bond produced, which was registrate after his father's decease, and no summons of registration raised against him. *Item*, That his father was but a cautioner in the said bond. In respect of all which the letters must be suspended without all caution or consignation to be made by the suspender; at least as to personal execution.

At the calling of it, to the first it was ANSWERED,—That, being a reason of suspension, is not instantly verified. To the second, repeats the same. As to the third, ought to be repelled, because the said decreet yet stands unreduced. *Item*, that the suspender's father was not a cautioner, but a principal debtor. *Igitur*, the suspender, whether major or minor, must be liable to the chargers for the sum charged for.

The Lords repelled the reasons of the suspension, in respect of the answers made thereto: only, if the suspender should produce any thing to instruct him or his co-debtors to have taken the benefit of the act of debtor and creditor, then he was to be farther heard thereanent, and the decreet to be stopped. Which he failyieing to do, the Lords adhered to their former interlocutor, and found the letters orderly proceeded, ay and while the suspender and his curators should pay the sum charged for.

Susp. Mr. Roger Hog. *Alt.* Mr. Alexander Oswald.

Signet MS. No. 48, folio 55.

1665. *February* 4. Sir ALEXANDER BURNET of Leys, *against* Sir JAMES BAIRD of Auchmedden.

SIR ALEXANDER BURNET of Leys charges Gordon of Park, Gordon of Cluny, and others, as having obliged themselves by bond, in 1660, to pay to him sundry chalders of bear, sundry chalders of meal, sundry silver duties, with caynes and poultry, and that during all the days of William Couttes sometime of Auchterfoulls his lifetime. Sir James Baird of Auchmedden arrests the same victual and others in Park's hands, for some sums of money addebted to him by William Couttes. Park suspends on double poinding. *Item*, if Leys should be found to have better right of the two thereto, suspends on thir reasons: 1*mo*, That there being legal debates anent the lands of Clunie, betwixt Gordon of Park and Couttes of Auchterfoull, the same were submitted to the Lord Brodie and others, who decerned Auchterfoull to dispone the whole rights of the lands of Cluny in favours of Park; ordained Park, for Couttes his better livelihood, to make yearly payment to him of the victual and duties charged for by Leys; for which having granted a bond blank, in the creditors' name, Leys gets his name filled up therein; whereas the same was allenarly granted to Auchterfoull's behoof, who, by disposition at the same time, obliged himself to warrant the lands of Cluny to Park, (who grants this bond now charged on,) from his own facts and deeds. Notwithstanding whereof he has granted a

right since to Keith of Keithaskmilne; and therefore till the lands of Cluny be purged of that right, the suspender has ground of the retention of the victual, &c. contained in the said bond; the only cause of granting thereof being for the rights of the lands of Cluny. *2do*, The said victual and duties are already paid to Auchterfoulls' factors, as their discharges thereof proport. At the calling and discussing of this suspension, the Lords suspended the letters *quoad* that which was instructed paid by discharges produced; found them orderly proceeded *quoad* the rest: discharge Auchmedden from troubling the suspender for the said sum, as a person found to have no right for aught that was yet seen. Burnet of Leys charges Park again on this decreet of suspension. He suspends the charge for the second time on the foresaids reasons. *Item*, That this charger can be in no better case than if Auchterfoull himself were charging, (to whose behoof the said bond was granted;) but so it is, that he would have been obliged to have premonished by the space of sixty days; *item*, To have warranted his disposition of the lands of Cluny, neither of which are done; *Igitur*. In this suspension Auchmedden compears by his procurators, and craves to be reponed against the foresaid decreet of suspension, and offers to prove, by William Couttes' oath, that he intromits with the said victual and silver which he had arrested in Park's hands, and had now charged for.

Which the Lords finding relevant, they assign to the procurators for the suspender a term to produce the said William Couttes to give his oath therein.

As to the reasons of the suspension against Leys, it was ANSWERED,—1*mo*, That they could not quarrel the decreet charged on; seeing they had homologated the same by partial payment since the pronouncing thereof. As to the requisition, offered to produce the instrument if need be. 2*do*, That the bond charged upon was to William Couttes' behoof, is only probable by the charger Leys his oath; and if he confess it, then the conditions of the bond are probable *vel scripto vel juramento* of the said William Couttes. 3*tio*, As to the warrandice, *non relevat* unless ye would say distressed; and what shall be so instructed they are content to allow, as also what shall be found discharged.

The Lords having considered the dispute, by their act of litiscontestation they find the trust probable by Leys' oath; which he granting, then they find the conditions alleged on in the suspension probable *vel scripto vel juramento* of William Couttes; ordain the suspenders to condescend what they are distressed for, that they may be relieved thereof; declare they will allow what discharges shall be produced by the suspender under the charger, or his factor's hands; ordain the charger to give his oath anent the rest of the sums and victual not found discharged, whether he has received the same; yea or no. Assign a day for producing their several clients, for giving their oaths anent the several points admitted thereto; reserving always to the charger his objections against the discharges, *et alia producenda*. Before the term assigned in the act comes, Burnet of Leys dies; whereupon his son serving himself heir to his father, pursues a transferring against the Laird of Park of the said act of litiscontestation foresaid, with all other minutes of process, &c. in his own person *activè*, and the said defenders *passivè*. The Lords transfer, reserving always to the said defenders, all their lawful defences in the principal cause, as well against the interest of parties, as others in the cause, as accords of law.

In the suspension, for the *suspender*, compear Mr. George M^c^Kenzie and Mr. William Strachan; the *charger*, Sir George Lochart, Mr. Robert Burnet; for Auchmedden, Sir Jo. Baird and Pat. Fraser. In the transferring, for the *pursuer*, Mr. David Falconer. *Alt.* Mr. Arthur Gordon, Thomas Baird, and George Nicolsone.

Signet MS. No. 49, folio 56.

1665. *February 7.* JAMES CUNNINGHAM *against* HARRY DENNISTON.

JAMES CUNNINGHAM, merchant in Edinburgh, charges Harry Denniston, merchant there, for payment of L.214, contained in a decreet obtained before the Bailies. He suspends because the charger is obliged to relief for cautionary whereunto he stands engaged for the said charger, as tutor to William Wilson his bairns, now in the sum of L.60,000; till which relief be granted him, the suspender, in all law and equity, must have retention of the sums charged for.

To this its ANSWERED,—That its noways relevant, unless the suspender were distressed for the said cautionary contained in the said act of curatory; which is not instructed.

Whereunto it was REPLIED for the suspender,—That the reason of suspension stands yet relevant, notwithstanding the answer made thereto; because the suspender cannot yet be distressed by the said children, they being minors, till their majority. *2do*, There is process depending at the said children's friends, their instance, against the charger, for count and reckoning, and payment-making to them, of the goods and gear left to them by their father; and when they have discussed the charger, they will then recur upon the suspender who is cautioner: and urged the case of a cautioner for a tutor *qui vergit in pauperiem*. Its duplied, that notwithstanding of the reply, the letters must be found orderly proceeded, because the ground of this charge is a clear bond for merchant ware received by the suspender, from the charger, long after his becoming cautioner for him in the said act of curatory; and if the suspender pleases, for his relief, he may raise inhibition against this charger upon the said act of curatory: Yea more, the charger offers to find him caution for relieving him.

Notwithstanding of thir reasons of suspension, with what was alleged in fortification of them, the Lords found the letters orderly proceeded for the sum charged for; reserving always to the suspender, or to the nearest of kin of the bairns of the said William Wilson, action against the charger, for removing of him from his intromissions with the minor's gear, as being suspect; or to find new and better caution as accords of the law.

Suspender, Sir Thomas Wallace. *Alt.* Sir Robert Sinclair.

Signet MS. No. 51, folio 57.

1665. *February* 8. GEORGE GRANT, Younger of Ballandalloch, *against* WILLIAM GRANT of Kerdells.

GEORGE GRANT, younger of Ballandalloch charges William Grant of Kerdells, to pay him L.2500, contained in a decreet obtained the last of July 1662. *Item*, To flit and remove from the lands of Kerdells, which he had comprised; to the effect he might enter thereto himself. This charge Kerdells suspends; because, 1*mo*, The decreet was pronounced on the last day of the session, whereon neither the suspender's reason of suspension, nor his action of count and reckoning that he had then depending against the charger were discussed, whereby he alleged the bond charged upon satisfied. Commission was granted to the Laird of Innes, &c. to be auditors in the said count, who refused to accept, as instruments taken thereupon do testify; so that the suspender was not *in mora*, nor was it his fault that the said commission did not take effect: therefore, till that count and reckoning be closed, the letters and all execution thereon must be suspended. 2*do*, The sums charged for are above L.1000, and so (the suspender having taken the benefit of the act of debtor and creditor,) no personal execution can pass therefore, and gives *cautionem juratoriam* only. At the calling of this suspension, it was farther craved for the suspender, that the Lords would grant a new commission in this matter. 2*do*, Offered to prove that the debt charged for was paid to the charger's father, by his intromission with the mails of the lands of Pitcroy, as tutor to William Grant, son to the granter of the wadset, against whom the comprising was led; in respect whereof craved a new commission.

REPLIED,—That the foresaid allegeance ought not to be respected, because the same being formerly proponed, was repelled both in a reduction, a removing, and in a process for mails and duties, whereupon twice sentence has followed, whereof no reduction is yet intented.

DUPLIED,—That the foresaid reply ought to be repelled, because if count and reckoning had been first craved, it had been found most relevant, and ought now to be received, because the suspender offers to prove the said debt satisfied within the years of the legal. The charger by his procurator, craved the suspender would condescend to whom the said mails and duties, or sums comprised for, were paid; whether to the charger, or to his father by and attour his intromission, whereby he is charged as tutor. Whereupon the suspender condescended that the charger's father, by his former intromission, received satisfaction thereof, as administrator of the law to his son.

REPLIED by the charger,—1*mo*, That the charger's father being tutor to the debtor, (to whom this suspender served himself heir,) long before the comprising led by the charger, the charger's father's intromission was not as administrator of the law to his son, but continued such as when he began, *videlicet*, as tutor to the debtor: so then it cannot he said, that the comprising was satisfied by his father's intromission as administrator. 2*do*, This same was formerly proponed and repelled; for it being formerly alleged, that the charger's father had acquired the right to the comprising with his own money, albeit his son's name was inserted therein, and therefore behoved to be considered as in his own name, and he having intromitted with the debtor's estate as tutor to him, he would be debtor to him in as much as would exhaust the apprising; which being repelled then, must be repelled now also, especially seeing the charger's father has found caution for payment of what shall be found due after count and reckoning. 3*tio*, The

suspender has no interest to propone the foresaid allegeance, seeing the pupil does not suspend; neither any warrant produced from the pupil.

All which being considered, the Lords find the letters orderly proceeded, ay and while the charge be obeyed.

Suspender, Sir Thomas Wallace, and James Abernethie. *Alt.* Mr. Thomas Lermonth.

Signet MS. No. 52, folio 57.

1665. *February* 8. GEORGE BAYNE *against* THOMAS HAMILTON.

JAMES LORD OGILVIE obliges him in 1659, to pay to Thomas Dewar in Dundee, 1000 merks. Thomas assigns Geo. Bayne, Merchant in Edinburgh, to this bond; whose wife, Elizabeth Colvill, knowing one Thomas Hamilton to be my Lord Ogilvie's Chamberlain, writes to him as *præposita negotiis mariti* in his absence, anent the 1000 merks addebted by my Lord. He by his missive in 1664, gives her a promise and assurance of payment at the next term. Upon this her husband Mr. Bayne pursues him to pay the same.

Its ALLEGED for the defender,—That neither is the letter directed to the pursuer, nor does it promise payment of the sum libelled to the pursuer.

To the which it was ANSWERED,—That it was, though directed to the pursuer's wife; and as to the promise opponed the missive.

The Lords decerned him to pay it, conform to his faithful promise, and missive letter in all points.

Act. Mr. Jo. Colvill. *Alt.* Mr. Thomas Baird.

Signet MS. No. 54, folio 57.

1665. *February* 9. AGNES ALEXANDER, Relict of THOMAS MARK, *against* THOMAS HADDOWAY.

AGNES ALEXANDER confirms herself executrix to Thomas Mark, wright in Wolmet, her spouse; and so pursues Thomas Haddoway before the Sheriff of Edinburgh, to redeliver to her a copper cauldron of twenty-four gallons, in as good case as the same was when he got it; or to pay 1001 merks as the price of it. The Sheriff decerns him to do it; whereupon she raises a precept, and causes charge him. He suspends the precept, 1*mo*, because he is most unjustly decerned, seeing that Nicoll, brother, and cedent of the said cauldron to the pursuer's husband, being addebted to the suspender in L.65, &c. he pursued him before the Baron bailie of the Canongate, for the same. They decern Nicoll to pay it; by virtue of which decreet, the suspender caused lawfully poind and apprise the said cauldron, as the instrument of poinding taken thereupon proves; after which, if Nicoll assigned the said cauldron to his brother Thomas, he knows not, but there was no intimation of any assignation made to him before the poinding. 2*do*, Mr. Robert Scot, Sheriff-Clerk, behaved himself most partially and maliciously in this

matter, as if he had been judge, procurator, and party. *Item*, that he was charged, contrary to Mr. William Wallace, Sheriff-Depute, his order and express prohibition. *3tio*, This decreet is null, because pronounced in time of vacance, without a dispensation; *Item*, because pronounced without probation, that either the said cauldron was only entrusted to the suspender by the said Nicoll, or that the said charger, his spouse, ever required this cauldron of him before his lawful poinding of it. On thir same reasons, a summons of reduction of the said decreet is intended. At the calling of this suspension, the suspender insisted on the first reason. Whereunto it was answered, that the said poinding was null, because executed *extra territorium*, without the privilege of the Canongate. *2do*, He opponed the Sheriff's decreet, wherein that same defence is proponed and repelled, in respect of a reply made thereto.

Which the Lords having considered, they found the letters orderly proceeded; and assoilyied from the reduction.

Suspender, Mr. Thomas Learmonth. *Alt.* Mr. Patrick Oliphant.

Signet MS. No. 58, folio 58.

1665. *February* 11. ALEXANDER CLUNIAS, Provost of Cromarty, *against* WILLIAM CLUNIAS.

ALEXANDER CLUNIAS, Provost of Cromarty, by his bond obliges him to pay 600 merks to Alexander Clunias of Dunskeith. This bond Dunskeith leaves in legacy to William Clunias. Which William, pursuing therefor, in the English time, obtains decreet; on which raising letters, the Provost suspends them in 1662. Yet protestation or a decreet of suspension is recovered against him; on which he is of new charged. He suspends on reasons which, at the calling of it, are reformed thus. *1mo*, Ought to be suspended, because the decreet whereupon it was raised was for null defence and not compearance. *2do*, Because he ought to have compensation for 1000 merks paid by the suspender, for Dunskeith the charger's cedent, to Mr. Alexander Ross, minister at Logie, to whom he was debtor in L.5000; and that in obedience to an arrestment laid on by the said Mr. Alexander, of the very same bond now charged for: which payment he was in *bona fide* to make, since it was before the said pretended legacy was left to the charger, at least before the intimation thereof. Now, if Dunskeith were living, and pursuing the suspender upon the foresaid bond left in legacy, the said compensation would be receivable against him; and therefore the same must now also be received against his legatar or assignee, especially seeing there is no other estate personal nor real belonging to the said defunct upon which the suspender may recur for his warrandice for the 600 merks bond. *Item*, at the best it is but a legacy which can have no place where there is debt: now the suspender is creditor to the defunct for his warrandice for the said 1000 merks paid out for him as is aforesaid. *3tio*, Dunskeith by his testament and latter will left the 600 merks to sundry persons, who have made over all their rights to one Alexander Manson; who, confirming himself executor dative and legatar to Dunskeith, is pursuing the suspender for payment making to him of the said 600 merks; till he therefore be discussed, this charge must be suspended. *4to*, They must be suspended *quoad* the annualrents and expenses of

the said pretended legacy, because the words of the legacy bear only 600 merks *simpliciter;* and therefore, *esto* the legacy sustain in law; yet, at the best, it cannot be judged of greater force nor a testament, wherein if a defunct give up only a man debtor in a principal, omitting annualrents, its judged in law a discharge to the debtor of what is omitted. *5to,* The charge must be suspended for the half of the said sum of 600 merks, because the same is due to the defunct's relict, the defunct having died without children, and the relict is preferable therein to any legatar; therefore the suspender craves retention thereof in his own hands, because the relict is his own daughter, he having good interest both as her father, and as a party contractor, to crave the sum to the effect he may pay it to her; especially seeing he has maintained her ever since her husband's decease, she having nothing of her own left her by the defunct but the half of that 600 merks, which the law provides her to. And as for the decreet, given in the English time, it was most unjust, seeing the testament wherein the legacy charged for was left, was not confirmed; without confirmation whereof nothing could be acclaimed thereby.

To the first reason it was ANSWERED for the charger,—That notwithstanding thereof, the letters ought to be found orderly proceeded, in respect of the decreet; and opponed the same pronounced *parte comparente.* Whereto it was replied, that though compearance was made, yet the same was most officiously done, without all order or warrant. To the second reason, answered that, 1*mo,* He opponed his answer to the first reason. 2*do, et separatim,* offers to prove, by the suspender's oath, (if need be,) that he or his son has obtained decreet before the Commissary of Rosse and his deputes, against the said Mr. David [Alexander] Rosse, at least against his heirs and executors, decerning them to give up to the suspender or his son the very bond of 1000 merks specified in the second reason, at least a sufficient discharge thereof. To the third, answered, 1*mo,* Its *jus tertii* to the suspender. 2*do,* Opponed this legacy now charged on as long posterior to any pretended legacies made to the said W. Manson his cedents. Yea, though W. Manson had either compeared for his interest in the first decreet, or were compearing now, he could never be heard to crave preference, in respect there is nothing more clear than that the defunct's last will and legacy innovates all prior testaments and legacies. But so it is, that these legacies mentioned in this reason, are long anterior to this. To the fourth, answered, oppones the decreet obtained *parte comparente* decerning him to pay annualrent. 2*do.* Oppones the legacy, whereby the defunct leaves that bond of 600 merks granted to him by the suspender: but so it is, the said bond bears annualrent: now it were absurd, that because the same is left in legacy, that therefore annualrent may be detained and kept, especially seeing it has now been owing these eighteen years, and there have been many decreets and suspensions therein. To the last answered, 1*mo,* its *jus tertii,* 2*do, et separatim, non relevat,* since the defunct was known to be a man of a plentiful fortune, why might he not leave that bond in legacy to whom he pleased; especially seeing the relict was sufficiently provided and secured *aliunde* by her contract of marriage.

All which dispute being considered by the Lords; *item,* The suspender's procurator refusing to produce his client to depone upon the second reason of suspension, they repelled the whole reasons, and found the letters orderly proceeded, ay and while they were obeyed.

Suspender, Ja. Aberneithy. *Alt.* Sir G. M'Kenzie.

Signet MS. No. 60, *folio* 58.

1665. *February* 11. GENERAL MAJOR THOMAS MORGAN *against* JAMES RIDDELL and his SON.

IN December 1660, James Riddell, merchant in Edinburgh, and his son, oblige them to pay to General Major Thomas Morgan L.436, 9s. 7d. Sterling. Ja. in 1661, pays L.200 Sterling of it; and, delaying to pay the rest, Morgan charges with horning. He suspends, that the ground of the granting of the said bond being a contract of copartnery betwixt Colonel Phinwick, Governor of the garrison of Leith, and this suspender, with the Captains Millar, Langlie, and Collison, for furnishing the said garrison with store of provision and victuals, there is addebted to him by the English soldiery, as he is able to instruct by counts fitted, by bills of soldiers, notes and receipts, by bonds or decreets, by missive letters under this charger, or General Monk's own hands, and many other evidents and instruments, above L.600 Sterling, whereof its like he will never get any payment or satisfaction, the soldiers now being all marched for England, and some of them for Portugal, &c.; and, therefore, though the Lords, in all justice and equity, grant him retention in his own hands, or compensation and abatement *de liquido in liquidum* of the said L.600, with the sum now charged for, yet he will be a most considerable loser. Then raises reduction of the said bond; at least craves new count and reckoning; and that after count, the said bond may be restricted to what should be found truly due, notwithstanding of a former count fitted, whereupon the suspender is alleged to have granted this bond now charged on, seeing the said count must be rectified, and many articles omitted therein, through haste of their march to England, (it being fitted that very day,) and threats made by the charger to pull down the suspender's house, to sell the timber thereof to make penny, &c.; which must now, in all reason, be allowed to him, the same being a public debt, and for the store of the citadel. *Item*, Craves the bond may be declared null, because violently extorted from him by the superior power of the then usurpers, Lambert and Monk, being then in difference, and all things being in confusion. And seeing the Lords of Session are pleased to revise the decreets given by the English Judges, sitting peaceably in judgment, notwithstanding of any homologation thereof; much more will they allow a review of the bond granted *metus causa, et vi majore*, a military power distressing the pursuer.

To this it was ANSWERED for the charger,—That this bond now charged on was after count fitted, wherein they offered them to prove that all the defalcations now craved by the suspender were allowed him. And for the missives produced, the same were civil recommendations, but no orders. *Item*, The suspender had homologated the bond by partial payment of it.

On this dispute the Lords named Stairs and Reddie auditors, to agree the parties if they could. No agreement following, the Lords, on the charger's supplication, remitted and recommended the cause to Kinglassie; to whom having given in their informations, he ordained them to be ready to dispute before the Lords, *in presentia;* when it was alleged for the charger, that the bond, homologated by the suspender was a private, pure bond of borrowed money. *Item*, That at the payment of the half of the said bond, the suspender offered the charger coal, salt, or other commodities, for the rest. *Item*, Was seeking to get money to borrow from sundry for paying thereof.

This allegeance the Lords found relevant to be proven by witnesses; and, therefore ordained the charger to have letters for summoning such witnesses

as he had condescended on; who compearing, deponed conform to the allegeance foresaid. After which the suspender's procurators, by supplication, craved letters to summon witnesses for proving the said bond was extorted *vi majore et metus causa.*

Whereto it was ANSWERED,—That no witnesses could be now led, seeing witnesses were already examined *ex officio*, and that not only on interrogatories made by the charger, but also by the suspender. *2do*, *Esto* it had been extorted, he has homologated it since in manner above specified. The Lords ordained him to condescend on the *vis major*. He said it was the authority of the usurpers and their threats.

ANSWERED,—Ought to be repelled, because the King was restored in May 1660, and this bond was not granted till December after. *2do*, When he voluntarily paid the L.200 in part of payment, and offered commodities for the rest, &c. the Parliament was sitting in Scotland, to whom, if any violence had been used, he might have made his address.

In respect of thir answers, the Lords repelled the reason founded on *vis major*, and found the letters orderly proceeded, ay and while the suspender should pay the sum charged for, with the annualrent thereof: suspended them *quoad* the failyie: assoilyied the charger from the reduction intented against him now and in all time coming. After pronouncing of which sentence, the suspender, by his supplication, craved Morgan's oath anent some articles wherefore he craved defalcation and allowance, the verity whereof he was content now to refer to the said charger his oath *simpliciter*. *Item*, In regard of his considerable loss, craved that he might be freed from paying annualrent. *Item*, May get a long term of payment of the principal sum, two or three years.

This supplication the Lords ordained the charger's procurators to see and to answer, who replied to the first demand, that it was unjust and unreasonable, since the articles, whereanent his oath is craved, are *hactenus judicata* fully debated before the auditor; before whom the charger offering to depone, they refused, so that they cannot crave it now. As for the other two demands, they are merely made to obviate the charger's petition he was to give in for the Lords modification of his expenses.

After which answer, the Lords ordained James Riddell to give his oath *de calumnia*, whether he had just reason to seek Morgan's oath in these particulars, yea or no. *Item*, Ordained that he having given the same, a commission should be granted for taking Morgan's oath; who, if he deponed *negativè*, then condemned the suspender *in maximas impensas.*

After which interlocutor, James Riddell refusing to give his oath of calumny, the Lords adhered to their former interlocutor, and found the letters orderly proceeded *ut supra.*

Suspender, Sir George Lockhart, Mr. William Maxwell, Mr. Thomas Lermonth.
Alt. Wallace and Cheap.

Signet MS. No. 61; *folio* 59.

1665. *February* 15. JAMES LAWSON *against* MARY LINDSAY, relict of James Cunynghame of Newhouses.

JAMES CUNYNGHAME of Newhouses, obliges him by bond in 1638, to pay to Alexander Job, his tenant, L.100. *Item*, in 1658, he grants bond to James Lawson in Templelands, for 200 merks. This James procures an assignation from the eys and executors of the said Alexander Job to the L.100 bond, and so pursues Mary Lindsay, relict of the said Ja. Cuningham, and executrix, confirmed to him, for payment-making to him of the said sums contained in the said two bonds.

It is ALLEGED for her, that no process can be sustained against her for the L.100 in Alexander Job's bond, because granted before the act of Parliament 1641; and, therefore, till an heir be served and retoured to him, the pursuer can have no interest thereto.

Whereto it was ANSWERED for the pursuer, that he insisted not *pro loco et tempore* for the said principal sum while the heir were served, but craved sentence for the annualrents thereof preceding Job's decease.

Whereunto it was REPLIED for the defender, that she must be assoilyied from the annual-rent, as also from the other bond, because offers to prove paid.

This the Lords found relevant, to be proven *scripto:* a day is assigned for that effect: her procurators failed, so that the term was circumduced against her, and she decerned her to pay the annualrents of the first bond, with the principal sum and annualrents owing of the other.

Act. Mr. Thomas Lermonth. *Alt.* Mr. Jo. Cunynghame.

Signet MS. No. 65, *folio* 61.

1665. *February* 15. JAMES NASMYTH *against* GEORGE STEWART of Auldhame.

JAMES HOME of Bonprie being denounced to the horn in January 1662, his liferent estate fell; the gift whereof Mr. Ja. Nasmyth, writer in Edinburgh, procures on the 2d of July, 1662; gets it past the seals on the 3d day of July. Then intents a general declarator of his gift. Compears, Geo. Stewart of Auldhame, advocate, for his interest; craves to be admitted; and for instructing his interest produces a gift of the same escheat dated in March 1662, sealed the 14th July, 1662; *item*, an instrument under a notary's hand, bearing Nicoll Somervell, servitor to the said George, to have several times required the said signature from Mr. William Burnet, keeper of the register of signatures, but could not get the same, and therefore protested for cost, scaith, &c. he might sustain thereby; *item*, a summons of general declarator of his gift, at the said George his instance. Then alleged, that, since he had the like declarator with the pursuer, and had done the first diligence before him, he ought to be preferred, at the least he was content that a general declarator might pass for them both together of one date, seeing his composition was first paid: and craved that each party's defences might be reserved in the special declarator.

Whereunto it was REPLIED,—That albeit George Stewart's gift was prior in date to the pursuer's, yet the pursuer's was expede before it; and the summons

raised, execute, and called before his; and, therefore, albeit posterior in date, seeing it was prior in diligence, the pursuer ought to have his gift first declared.

Upon which dispute the Lords preferred the pursuer. After pronouncing of which interlocutor, the cause being again called, George Stewart craved to be first declarator, notwithstanding thereof; in respect he had the first gift and first signature, and had done first diligence thereon; and any interruption made in passing through the seals, was not his default, but the treasurer's clerks, who kept up the same while the pursuer's gift passed. Whereunto the pursuer repeated his answer *ut supra.*

On this the Lords adhered to their former interlocutor. Then ALLEGED;—That no respect could be had to the pursuer's gift, because he offered him to prove, that the debt which was the ground of the horning was satisfied. *Item*, that the pursuer at the taking of the gift granted back-bond to the treasurer, declaring his gift to extend only for payment of the debt contained in the horning whereupon the gift proceeded.

REPLIED *nullo modo relevat* to say the debt was paid, unless ye say before denunciation and registration of the horning.

In respect of which reply; *item*, that the said George produced not the back-bond, nor no declaration relative thereto under the treasurer's hand, they repelled the allegeance; and preferred the pursuer; and declared his gift in *communi forma.*

Act. Da. Dinmuire.

Signet MS. No. 70, *folio* 61.

1665. *February* 16. PETER COUPER, Commissary at Inverness, *against* The MAGISTRATES of INVERNESS.

PETER COUPER, Commissary at Inverness, comprises a tenement of land lying within the town of Banff, for a sum of money addebted to him by the heritor; then charges Sir Jo. Baird of Auchmedden, provost, with the bailies of the town, to infeft him therein in free burgage. This charge they suspend, 1*mo*, Because by an inveterate custom amongst them, whoever craves to be entered vassal of the said town must make himself burgess, and pay the accustomed duties therefore, which this charger has not yet done. 2*do*, *Esto*, There were no such law and practique amongst them as there is, yet the suspenders could never be forced to enter the charger till he had paid the yearly rent of the said lands comprised, and presented a formal charter to the suspenders for that effect, which is not done. 3*tio*, They can give no obedience to this charge, till the charger become an actual residenter of their burgh, and keep court and plaint, and pay common burdens as neighbours do.

To the first ANSWERED, *non relevat*, because beyond all controversy the suspenders are obliged to accept comprisers, albeit they be not burgesses. To the second answered, that the suspenders are obliged to accept comprisers without any composition to be paid for entry, seeing the lands are not holden of them as superiors, but of the king in free burgage, whose bailies the suspenders are; as was found in the decision of a former action, betwixt *Hay of* , and the *Burgh of Aberdeen.* To the third, it is not requisite a vassal compriser be a residenter in

the burgh, in regard his lands must bear common burdens as other lands do within the burgh, whether he reside or no.

After which dispute, the Lords found the letters orderly proceeded, ay and while the suspenders entered the charger to the said tenement by infeftment, &c.; the charger always paying to the suspenders the duty used and wont.

Suspender, Mr. Thomas Baird. *Alt.* Sir Geo. M'Kenzie.

Signet MS. No. 76, folio 62.

1665. *February* 16. SIR MUNGO STIRLING of Glorat, and JAMES EARL of CALLENDAR *against* JAMES VISCOUNT of KILSITH.

SIR MUNGO STIRLING of Glorat, as principal, and Ja. Earl of Callendar, as cautioner, oblige them to pay to Sir William Levinstone of Kilsith, 81,000 merks in 1645. Livinstone assigns this bond to Andrew Ramsay, his servitor, who thereupon comprises the lands of Glorat, lying within the Sheriffdom of Stirling, in 1655. Then by his retrocession, the said Andrew repones Kilsith in his former right and place. All this while, the annual-rents of the said principal sum comprised for are paid punctually. Then Glorat, intending an order of redemption, raises letters of premonition of James now Viscount of Kilsith, as heir served and retoured to his father, and his tutors and curators, for their interests, to compear, &c. and to accept and receive the sums of money contained in the process of apprising; and thereupon to acknowledge and grant the said lands to be lawfully and duly loosed, outquit, and redeemed. At the day the order being used, instruments of redemption are thereupon taken. Then Glorat and Calendar intent summons of declarator of redemption of the said lands; *item*, of the property of the same, charging them to compear, and to hear and see themselves decerned, to resign, renounce, and upgive the said lands, as lawfully redeemed; *item*, to make, subscribe, and deliver valid grants and renunciations of the redemption; *item*, to deliver up to the pursuers the process of apprising, with the grounds thereof; *item*, with all that has followed thereupon; *item*, to hear and see it found and declared, that the good and undoubted right and property of the said lands redeemed belongs to the pursuer allenarly. At the calling of this action, the procurator for the pursuer declared that he passed *simpliciter* from that part of the summons whereby he craved decreet of declarator of the property of the said lands; *item*, that he insisted only for declarator of redemption of the said lands; which decreet he declared should be no acknowledgment, allowance, approbation, or strengthening of any of Stirling of Glorat his infeftments or rights to the same lands; but that he and Kilsith should be in that very same state, case, and condition, as to their respective claims and interests in the said lands that they were at the leading of the said apprising, &c.

Whereunto it was ANSWERED for the defender, that the order of redemption cannot be sustained; neither can the lands be declared orderly redeemed, until first the pursuer consign and offer the principal sum and annual-rents contained in the bonds and apprising, but likewise the penalties, sheriff fees, and expenses debursed in leading the apprising, and in passing and expeding the infeftment thereon; which they have not done. Whereupon the pursuers gave in a supplication to

the Lords, humbly craving they might be assoilyied and freed from the penalties and Sheriff fees. 1*mo*, Because they craved compensation for 800 merks of penalties, contained in two bonds granted by Kilsith, which the pursuers, by satisfying them, had acquired right to. 2*do*, Callendar, as being forfault by the usurper, might have taken the benefit of the act 1661, anent forfaulted persons their not paying of eight years annual-rent, the benefit of which act the Earl would not take; and therefore, &c. *Item*, offered, what expenses should be given in in account, to pay the same at the modification of the Lords. Upon which supplication the Lords ordained the defender to give in an account of his disbursements; who gave in the count following; for registration of two bonds, one of them registrate by way action, L.20; for raising of horning thereon, and getting them signet, L.5, 16s.; for using of requisition upon one of the said bonds, L.5, 16s.; for raising letters of apprising, signet to them, executions thereof, claim, acts of court, decreet of apprising, instrument money, house dues, Sheriff fee, allowance of it, raising of letters to charge the superior thereon, &c. L.200; for writing a charter, L.8, 13s.; for taking seasine thereon, and its registration, L.30; for a disposition made by Andrew Ramsay to Kilsith, L.30; for an instrument of resignation *ad remanentiam* L.30; *summa totalis*, L.306, 16s.

Upon which account the Lords found the lands orderly redeemed, &c. the said L.306, 16s. being also paid with the rest; *item*, declared and ordained conform to the desire of the summons, unless in so far as the pursuer passed therefrom.

Act. Mr. Lawrence Oliphant. *Alt.* Mr. Jo. Cunynghame and William Braidie.

Signet MS. No. 78, *folio* 62.

1665. *February* 17. MARION BROWN, relict of Jo. Wauchop, and WAUCHOPS their Children, *against* JO. WAUCHOP of Gleghorne.

MARION BROWN, relict of Jo. Wauchop, and the children of the marriage betwixt them, charge Jo. Wauchop of Gleghorne, for payment making, (conform to his bond granted in 1664 to the said John,) of 400 merks. This charge he suspends on thir reasons; 1*mo*, That formerly having made an offer of the said 400 merks, he found the chargers incapable to grant him sufficient and valid discharges therefore, in respect the chargers had denuded themselves of the said bond and sums of money therein contained, by assignation made in favour of Mr. Robert Clerk, writer in Edinburgh. Notwithstanding whereof, he only minding the chargers' good, granted them new bond for the 400 merks, and took her bond for delivering and obtaining to him of the former bond, given up to Mr. Clerk, with the assignation thereof, or at least his sufficient discharge thereof; nothing of which the chargers have yet done. Therefore, (lest he should be liable in double payment,) he craves the letters may be suspended ay and while the other bond be fulfilled. *Item*, because the said Mr. Robert Clerk is dead, he craves an extract of his testament; *item*, that the said sum may be confirmed and discharged by his lawful executors. 2*do*, No execution can pass on the said bond, charged on at the children's instance; because, by the tenor of the bond, the same is only payable to them at their mother's decease; and though their mother were deceased, they ought to be authorized, being all minors, with tutors and curators, before he

could *tuto* pay them any sums of money. At the same time, Cleghorne charges the said Marion Brown, upon her bond, to deliver to him the said 400 merks bond, with the assignation thereto made in favour of Mr. Robert Clerk, &c.; *item*, to pay L.100 of penalty, contained in the bond, for her failyeing.

This charge she suspends on this reason, That the bond charged on is intrinsically and of the law null, being *ob causam datam, causa non secuta;* for when she granted the said bond, it was in expectation either of present payment to have been made to her of the said 400 merks, or of most sufficient security for payment thereof; but, to the contrary, he sent her a most insufficient bond, as appears by his suspending of it since: and, therefore, till such time that he grant her a better security, she cannot be holden to obtemper his charge. At the calling of thir two suspensions, there is produced by Marion Brown the first bond, with the assignation thereto, in favour of Mr. Robert Clerk, and Mr. Robert his discharge on the back thereof.

Upon the which production the Lords found the letters at her instance against Cleghorne orderly proceeded, ay and while he paid the said sum. Suspended them *quoad* L.40 of penalty. Suspended the letters raised by him against her; only ordained the clerk of the process to deliver up to him the foresaid first bond, with assignation and discharge, upon his receipt thereof, which should be to the clerk a sufficient warrant.

For *Cleghorne*, Geo. Stewart. *Alt.* Mr. Thomas Lermonth.

Signet MS. No. 80, *folio* 63.

1665. *February* 18. DAVID HOME, and HARBERT GLEDSTANES *against* JAMES JOHNSTON and his SON.

MR. DAVID HOME, indweller in Edinburgh, as cedent, and Harbert Gledstanes, merchant there, as assignee, charge James Johnston, in the Westerlaw of Whitsome, and his son, for payment making to them of 515 merks, as the tack duty of the lands of Whitsome-hill, set to them for three years. *Item*, to pay sixteen cayne fouls; *item*, to pay a boll to the hird; *item*, to leave the hay at their way-going, win, and standing in the rook, &c. conform to a tack granted by the said Mr. David, of the said lands in 1649.

This charge they suspend, 1*mo*, Because general, noways condescending on the particular years that the said tack-duty is resting, but only general for three years; and, therefore, till such time the chargers condescend on the particular years, the suspenders can make no special obedience. 2*do*, *Esto*, the particular years condescended on in the tack were also in the charge; yet the chargers can never distress the suspenders for the whole three years in the tack, but only for two of them, to wit, from Whitsunday 1649 to Whitsunday 1651, seeing the suspenders possessed the lands no longer. The English coming in 1650, and Dumbar being fought, the whole country of the Sheriffdom of Berwick was plundered, and, amongst others, the suspender lost his whole stock; whereon, in 1651, he renounced the said tack to Mr. David, then heritor of the lands; who accepted of the same, by labouring the said lands either by himself or by tenants; the verity whereof the suspenders refer to Mr. David his oath. And as for the two years they possessed,

they were ever willing to have counted with the said Mr. David for them, but he declined; this they refer to his oath likewise. But, *3tio*, if he would come to count and reckoning with them, they offer to make appear, that he is more nor paid of the said two years duty; partly by money paid to the collectors and sub-collectors of the sheriffdom of Berwick for the time, for cess and other public burdens, which Mr. David was obliged to relieve the suspenders of, by the tack, at the least, to allow the same the forend of the said duty; and partly in repairing of the houses of the said lands, which he was likewise obliged to relieve him of; all which summed together makes L.818, whereof the suspenders have discharges and receipts to show. *4to*, Mr. David having charged them, they suspended. During the time the said suspension stood yet undiscussed, he assigns it to this man who now charges; *igitur*, no charge can be sustained at his instance till the first suspension be discussed. *5to*, For the cayne fowls, and other remaining heads of the tack, offers to prove them fulfilled by the charger's oath.

To the second reason above written, it was ANSWERED for the charger, that he insisted only for 1650 and 1651; and offered to prove, by the suspenders' oath, that he sustained no loss nor vastation for the said two years. The suspenders referred the same back again to his oath. Then, in fortification of the third reason, there are produced discharges for L.818, which is alleged will more nor pay the charger all he can acclaim for the duty of the said two years; at least, what they do not instruct by writ, they are content to refer the payment thereof to Mr. David his oath. He being examined upon this and the second article, he deponed *negativè*.

Whereupon the Lords suspended the letters *simpliciter* for the sums contained in the discharges; found them orderly proceeded as to the remaining sums charged for, amounting to L.191, *salvo justo calculo*, with 80 merks of expenses contained in the tack charged on.

Suspender, Mr. Alexander Spottiswood. *Alt.* Mr. Jo. Harper.

Signet MS. No. 83, *folio* 63.

1665. *February* 18. Sir GILBERT STUART of Polkaik *against* THOMAS ROBERTSON, alias MACCONDOCHIE.

THOMAS ROBERTSON, alias Maccondochie, in Dunkeld, is addebted to Thomas Young there in 250 merks. This bond Thomas assigns Sir Gilbert Stuart of Polkaik to; who charges thereon. Robertson suspends, 1*mo*, Because he never had any dealing with Thomas Young, the cedent, though the bond bear borrowed money; offers to prove the bond to be false and feigned, as he has really intented summons of exhibition of the bond to that effect. *2do*, *Esto*, It were a true debt, he craves compensation of greater sums addebted by the cedent to him. At the calling of this suspension, there is proponed this eiked reason, that Polkaik's assignation was to his cedent's use and behoof; which being proven, they offered them to prove by the cedent's oath, that the bond charged on was consigned blank in William Rosse his hands, to have been filled up in the sum at the sight and de-

termination of two friends; without which the cedent filled up most fraudulently the sum charged for.

The first part of this eiked reason, *videlicet*, That the assignation was to the cedent's behoof, the Lords found it relevant to be proven by the assignee his oath: whereupon a commission is taken to the bailies of Perth for taking his oath; who deponing that it was to his own behoof, the Lords found the letters orderly proceeded as to the sum charged for.

Charger, Yeoman. *Alt.* Nathaniel Fyfe.

Signet MS. No. 84, *folio* 64.

1665. *February* 18. Jo. BROUN *against* MARGARET TAITT, Relict of Thomas Burn, and MARGARET TAITT, her Mother.

MARGARET TAITT, relict of Thomas Burn Candlemaker in Edinburgh, and Margaret Taitt, widow, her mother, as cautioner, in 1662 grant bond to Pat. Broun fletcher, for 1700 merks. Pat. assigns his brother, Jo. Broun merchant, to this bond; and he dying within four days after the assignation, Jo. charges with horning, denounces, registrates, raises letters of caption, takes them and imprisons them. They suspend, 1*mo*, Because prove 700 merks of it paid by discharges produced. 2*do*, Consign 300 merks in the clerk of the bills his hands to be given up to them. Deny the remanent of the debt. 3*tio*, The assignation was not intimate till after Pat. his decease; and, therefore, Jo. unwarrantably charged with horning, and then raised caption; since the most he could have done in that case, was to raise a summons against the suspenders to hear and see themselves decerned to pay, &c. wherein they would have had liberty to propone all their lawful defences.

The Lords suspend for the sum instructed paid by the discharges; *item*, For the sum consigned. Find them orderly proceeded for the rest.

Suspender, Abernethy. *Alt.* James Broun.

Signet MS. No. 88, *folio* 64.

1665. *February* 18. ALEXANDER FRASER of Philorth *against* The MAGISTRATES of ABERDEIN.

ALEXANDER FRASER of Philorth, as donatar to the liferent escheat of Sir Alexander Fraser of Fraserburgh, his godsire, charges the Provost, Bailies, and Council of Aberdein, to deliver to him two great fleiting tuns and four small ones, with their iron chains, iron girts, wedges, mells, gavelocks, and other ornaments and pertinents which were lent to them by the said Sir Alexander, and which they were ordained to redeliver by a decreet of the Lords in 1643. This charge they suspend 1*mo*, That they are not the Magistrates that were in office the time that decreet was pronounced against the town, and so are strangers thereto. 2*do*, The charge ties them to an impossibility, to wit, to redeliver them in six days. Now they,

are of so huge a quantity, that they cannot be transported by land; and by sea its thirty-six miles betwixt Aberdeen and Fraserburgh, (where the charger dwells,) and the seas are now troublesome. *3tio*, The suspenders were ever, (as they are likewise now,) most willing to redeliver them, as appears by an offer thereof made by them to Philorth in 1652, and instruments taken thereupon that he refused. *4to*, In case of their not delivery of the tuns themselves, offer the value and prices of them, as they shall be liquidated by indifferent and judicious men, they being really worth L.2000. *5to*, The charge is general, and so no obedience can be given thereto; it condescends not on the pertinents; it condescends not on the manner how they should be delivered, nor the place whereat, &c.

The Lords find the letters orderly proceeded; ordain them to be redelivered to Philorth; supersede execution till the 1st of June next to come.

Act. for Philorth, Pat. Fraser. *Alt.* Sir Thomas Wallace.

Signet MS. No. 89, *folio* 64.

1665. *February* 20. TOWN of EDINBURGH *against* SIR WILLIAM THOMSON.

THE Council of Edinburgh, without the concourse of the crafts and their extraordinary deacons, having deposed Sir William Thomson, their clerk, for this fault, that the excise of their Town being farmed to three or four brewers by way of tack and contract, wherein the Council subscribes their part of the tack, and remits to Sir William to see the fermorars subscribe for payment of the duty, and he neglecting to get their hands thereto by the space of year and day; and at the expiring of the tack the fermorars craving ease of the duty, and being threatened with a charge of horning; the town finds the tack not subscribed; and they having ordered Sir William to see it done, and committed it to him by an act of their council; they representing to him his fault, he submits his censure to the council, who immediately deposes him, without either citation, libel, or any other solemnity: he thereon raises reduction, upon four reasons, which are set down at large in the informations.

The Lords, at the advising of the cause, fell, 1*mo*, on the relevancy of the cause of his deposition. After some debate anent the method to be observed, they found the cause of his deposition relevant, unless he could prove the tacks were yet subscribed. The reasons moving the Lords were, 1*mo*, That so great a neglect was a presumption of dole on Sir William's side, though he offered to make up the damage sustained by the town through the fermorars their not subscribing. And, 2*do*, they thought that though the way of procedure was somewhat illegal against a clerk, provided *ad vitam* to his place, yet that *multa fieri non debent quæ facta valent*, especially betwixt a master and a servant. The dispute I have at large.

Act. Wedderburne, Sinclar and Lockhart. *Alt.* Wallace, Cunnyghame and Mackeinzie.

Advocates' MS. folio 53.

1665. *February* 21. CREDITORS of the LAIRD of CRAIG *against* His LADY.

LAIRD of CRAIG having given his lady a jointure of thirty chalders victual, and thereafter *stante matrimonio* having given her an additional jointure of twenty more: and this additional &c. being craved to be reduced, 1*mo*, Upon the act of Parliament made against dyvors: 2*do*, That the same was revoked by her husband, by giving infeftments of his lands for debt contracted by him; at least, the creditors having comprised in his own lifetime or thereafter:

The Lords found that for debts contracted before the additional jointure he was no bankrupt, having an estate sufficient at that time to have paid them; and, therefore, ordained the lady to pay the annualrents of these debts, during her lifetime, or the creditors to find a merchant for the sale of so much as would pay them; and the lady to renounce her liferent of so much as should be sold for their satisfaction, but prejudice to her to affect the rest; and for debts contracted after the additional jointure, whereon other infeftments or comprisings have followed, they found the same no tacit revocation, as was alleged, and that her right did subsist notwithstanding thereof.

Act. Norvell. *Alt.* Cunyghame. In P. D.
Advocates' MS. folio 53.

1665. *January* 20. BARCLAY *against* BAPTIE.

BAPTIE having given a ticket subscribed with his hand, bearing him to have confessed that he had gotten a bairn with Barclay, under promise of marriage; whereon the woman having recovered decreet before the Commissaries of Edinburgh against him for adherence and solemnizing the marriage; and being suspended on thir reasons, that *ex æstu et fervore passionis* he had given that ticket, which was also vitiated *in substantialibus*, and that she had since borne a child to another man: this the Lords desired to hear *in presentia*. The information of it I have largely set down.

Act. Cunyghame. *Alt.* Lockhart.
Advocates' MS. folio 53.

COLONEL FULLARTONE's cause against my Lord Kingstone I have in a paper at length, which is well worth the considering.

Act. Sinclar. *Alt.* Cunyghame. In P. D.
Advocates' MS. folio 53.

1665. *February* 22. FORBES of Asloun *against* The LAIRD of PHILORTH.

IN a case betwixt Forbes of Asloun and Philorth, found that a horning on a registrate bond against Asloun, who was charged on six days to pay, though dwelling beyond the water of Die, sufficient; notwithstanding of the act of Parliament: which they found only to extend to charges on letters before the Secret Council: and that in bonds for borrowed money the debtor had in effect renounced that benefit of the law by consenting to be charged on fewer days; and that *dies interpellat pro homine.*

Act. Advocatus. *Alt.* Mackenzie. In P. D.

Advocates' MS. folio 53.

1665. *Feb.* 22. PALLET and FAIRHOLME. In P. D.

IN a case betwixt Monsieur Pallet and Thomas Fairholme, who had drawn a bill on Pallet to ship a loading of wines on Ninian Williamsone's credit; The Lords found Fairholme as well obliged to pay the price of the wines as Williamsone, upon whose credit they were advanced, and under whose covert the bill drawn by Fairholme was sent to Pallet. The case I have elsewhere.

Act. Wedderburn. *Alt.* Cunyghame.

Advocates' MS. folio 53.

THE matter of the cruives on the water of Don, betwixt the town of Aberdein and the heritors, see it elsewhere.

Act. Advocatus. *Alt.* Lockhart. In P. D.

Advocates' MS. folio 53.

1665. *February* 22. SIR GEORGE KINNAIRD *against* REIDS.

SIR GEORGE KINNAIRD, as donatar to the master of Gray's recognition, pursues a declarator of the hail barony of Foulls, to the which Mr. Andro, Pat. and Robert Reids, were called, who were vassals to the Lord Gray, by service of ward and relief for the lands of the Knap, and which were disponed by the Lord Gray's predecessors to the Lairds of Moncur, 300 years ago. Amongst other debates in that case, whereof I have the note, it fell to be questioned, if the lands of Knap, sold as said is, could recognosce upon deeds done by this Master of Gray, *post tantum temporis intervallum*; or if the deeds of his predecessors, could be drawn back and conjoined with the deeds done by this Master of Gray, so as to make up the cause of recognition.

It was found that the Knap, being a part of the barony of Fouls, feued out 300 years since, without the superior's consent, did recognosce to the superior and his donatar, by the deeds done by this last vassal; for the deeds of all the

vassals being joined made up the alienation of the greatest part of the feu without the superior's consent, and so recognosces; *item*, found that confirmations of base infeftments, though in the usurper's time, saved from recognition.

Act. Nisbet, Wedderburne. *Alt.* Wallace, Dinmuire. I. P. D.

Advocates' MS. folio 53.

1665. *February* 22. WILLIAM YEAMAN *against* PATRICK OLIPHANT.

The Lords found in a declarator of the expiration of a comprising by intromission, &c. where a compriser has two titles in his person, and has entered in possession of the lands by virtue of the comprising then standing in his person, that he cannot ascribe his possession to any supervenient right or title he should thereafter acquire, posterior to his comprising and possession thereon.

In this same cause also, betwixt Wm. Yeaman and Mr. Patrick Oliphant, found that though parricide was a special kind of murder under trust; yet that the act of Parliament defined another punishment therefore nor treason, which was the forfaulture of the heirs of the parricide *in recta linea*, and giving the estate to the nearest collateral.

It was also found that the punishment of contumacy for a crime, wherein if the defender had compeared, he would have been forfaulted, could infer no other punishment but allenarly the confiscation of the pannel's moveables, being only charged with horning to appear to find caution to underly the law. The large Information of this I have.

Act. Lockart, M'Keinzie, and Dinmuire. *Alt.* Cunyghame and Maxwell.

Advocates' MS. folio 53.

1665. *February* 22. SHAWS *against* MR. SHAW'S Executrix.

MR. SHAW, a Scotsman, upon death-bed, being intimate with one Mrs. Lewis, at London, where he died; and she being a chastie young woman, takes advantage of his condition, and asked him if he would leave her executrix; and he, being in that estate that he would have answered *affirmativè* to any thing she had propounded to him, said he was content; and this being spoken before witnesses, she proves the same before the prerogative court of Canterburie, which has the force of a testament by the English law, being that the civil law calls a nuncupative testament. She claiming right to his moveables in Scotland, by virtue of this testament, the nearest of kin, they compear and take a dative; and then debating anent the preference, the Lords found that her nuncupative testament was not a valid title in Scotland to claim his moveables here, as the executor dative could not prejudge her with the nuncupative testament as to the moveables in England; and so preferred the nearest of kin to the Scots estate, he being a Scotsman, and Mrs. Lewis to the English moveables.

Act. Mackeinzie. *Alt.* Cunyghame. In P. D.

Advocates' MS. folio 54.

1665. *June* 12. SWINTON *against* NOTEMAN.

A WOMAN being left tutor to her children, and thereafter marrying, and so losing her tutory, her husband behaves himself as tutor and administrator: The minor thereafter convenes him for count, reckoning, and payment, not only of what he intromitted with, but for his omissions, and what he might have intromitted with; and so contended to make him liable in every thing as a tutor, even for his neglects in desperate debts; for which the civil law was adduced.

The Lords found him not liable to count but for what only he did intromit with, and for what he might have done upon that subject of intromission, but no farther, and not for his omissions in any other thing belonging to the minor. But they made an Act of Sederunt for the future, that pro-tutors should be liable in *omissa* and *commissa*, as well as other tutors, in all time coming.

Act. Wallace. *Alt.* Lockhart.

Advocates' MS. folio 54.

1655. *June* 20. LORD LOUTHIAN *against* The TOWN OF JEDBURGH.

THE Lord Louthian against the Town of Jedburgh, and they against him: there being mutual declarators by other of thir parties against others, to hear and see some lands lying contigue to the said town, belonging in property to my Lord, as a part of his barony of Ancrum, declared free of any jurisdiction the town could pretend over them: And, on the other hand, the town contending they belonged to their jurisdiction, in so far as it was offered to be proven that, in their charter of erection, they have all the privileges of a free burgh royal, granted to them within their town, and parts and pertinents thereof; and it is offered to be proven that thir lands now controverted are parts, &c. of their town, in so far as they have been in use to hold courts, fine and imprison the inhabitants of these lands, as burgesses; likeas the whole inhabitants thereof are burgesses, and enjoy the hail privileges of burgesses, and the crafts and merchants dwelling there have been in constant use to subject themselves to the town deacons; and in all things, either active or passive, competent to burgesses of burghs royal, they have enjoyed them these 40 or 50 years: All which is sufficient in law to induce a right of jurisdiction over them.

ANSWER,—Thir lands being a part of his barony, wherein he stands infeft, holden of the king, and the inhabitants being his tenants, he has been in possession of jurisdiction there, by virtue of his infeftment, past memory of man; and any use or possession his tenants have had of making themselves burgesses there, and subjecting themselves to their jurisdiction, cannot prejudge him, nor yet can his connivance at that subjection hinder him to seek this declarator for the future against the said town; especially seeing thir lands do not hold burgage of the burgh, nor are they expressed in their charter of erection. And it is inconsistent both with law and reason that Jedburgh should have jurisdiction when they have neither property nor superiority; which is in effect to make *accidens sine subjecto*, since *imperium inhæret territorio.*

ALLEGED,—It is no new thing to see a burgh royal have jurisdiction where they have neither property nor superiority; and a burgh of barony and royal are consistent, as in Dysart. This was to be heard *in presentia*.

Act. Cunyghame. *Alt.* Lockhart and Wedderburne.

Advocates' MS. folio 54.

1665. *June* 24. ——— *against* EDGAR.

THERE is a bond granted by one Edgar to his daughter, wherein he ties himself to pay her 4000 merks at her complete age of 18, with annualrent thereafter, she being married and provided to a jointure by her husband; and this sum falling to her after the marriage, by the decease of some of her brethren, to whom this sum was payable at their 18, and failyieing of them by decease, to accresce to the rest surviving: Thereafter her husband dying, his executors convene Edgar, son and heir to the father, to pay the sum.

ALLEGED,—That this being an heritable sum, and no particular assignation made thereof by the widow to her husband, *stante matrimonio*, they cannot have right thereto.

ANSWER,—It was moveable, for though the bond being prior to the act of Parliament 1641, was heritable, bearing annualrent after the time, yet the intervening act of Parliament made it cease to be heritable *quoad* the executors, but to stand in its own nature heritable *quoad fiscum et relictam;* and she having fallen that sum *stante matrimonio*, and before her husband's decease, there was *jus quæsitum* to the husband thereto as to a moveable sum, and so it belonged to his executors. ANSWER,—That grant the act 41 made sum moveable, *quoad* the executors, yet the subsequent act 1661 declared the husband from all benefit or right thereto, where the bonds are made to the wife, and the wife, where the bonds are made to the husband; which act is retrotracted to the year 1641. ANSWER,—The act of Parliament 1661 does not derogate to the act 1641, but only declares the estate of man and wife, after their respective deceases, in relation to bonds made to man and wife *separatim;* but this being a sum moveable fallen to the wife *stante matrimonio*, before the husband's decease, there was *jus perfecte quæsitum* to the husband, and so to his executors. Which the Lords found true.

Act. Sinclar and Cunyghame. *Alt.* Lockhart.

Advocates' MS. folio 54.

1665. *June*

THE Lords found, that in a sentence given against a party, wherein the defender declares he shall be satisfied with the probation of one witness singly, to

be binding; and that though citation and probation be *juris naturalis*, wherewith a man cannot dispense, yet that in a civil matter he might do so. But in *delictis* it is far otherways.

Advocates' MS. folio 54.

1665. *July* 24. SCOT *against* SOMERVELL.

IN this case, found that a party, in obedience of a charge of horning, having consigned the sum in the clerk's hands, not maliciously,—that the peril and hazard of the consigned money follows the charger, and not the consigner; for at that time, Harie Hope being Thesaurer did bankerout.

Act. Lockhart. *Alt.* Wallace.

Advocates' MS. folio 54.

1665. *July* 24. ROW *against* The VISCOUNT OF STORMOND.

IN a case betwixt Row and the Viscount of Stormond, [FOUND] that a summons raised within year and day, and not executed, prescribes. For which there is no reason at all, but the benefit of the signet.

Advocates' MS. folio 54.

1665. *November* 1. DAVID THOIRES *against* SIR ANDREW RAMSAY.

COLONEL DAVID RAMSAY, by contract of marriage betwixt him and Janet Skein, is bound to provide her to eighteen chalders of victual, or 1800 merks of money yearly; and having purchased the lands of Grangemoore, only worth nine chalders of victual, he takes the disposition in his and his wife's name; wherein mention is made, that his wife accepts of that right and infeftment of the lands, in satisfaction of all that she could crave from her husband, or his heirs, by virtue of her contract of marriage, and in acceptation thereof; whereupon she is infeft and in possession during his lifetime: Thereafter marrying Mr. David Thoires, there is a summons raised against Sir Andrew Ramsay, provost of Edinburgh, as heir, for implement of her contract of marriage, who obtruded the provision and infeftment of the lands of the Grange, granted to her in satisfaction, likeas she had homologated the acceptation by possession of the said lands. Which the Lords, by their interlocutor, found relevant, and that her possession of the lands was an homologation of the provision. Which was hard, and the preparative dangerous; but the consideration that moved the Lords was, that Colonel

Ramsay had no more estate in the world but that money which was employed for buying of the Grange, and whereto she was provided.

Act. Thoires. *Alt.* Lockhart.

Advocates' MS. folio 54.

1665. *November* 1.

THE Lords found that in blank bonds where there is any other man's name filled up nor his to whom it was delivered, that the party whose name is inserted ought to intimate to the debtor that his name is filled up therein; and that before intimation thereof, the creditors of the party to whom it is delivered may affect it by arrestment or otherways; and in effect found it like an assignation. Which was well decided.

Act. Lockhart. *Alt.* Cunyghame.

Advocates' MS. folio 55.

1665. *November* 1. WALTER PRINGLE *against* ———

IN a case betwixt Walter Pringle of Greinknow, &c. found that a subvassal being infeft *cum curiis*, might be judge of Bluidwyts.

Act. Pringle. *Alt.* Trotter.

Advocates' MS. folio 55.

1665. *December* 1. YOUNG *against* BARNES.

IN this case, found that the possession of lands apprehended by the daughter, after the father's decease, who had disponed that land to his daughter, in satisfaction of her mother's contract,—could not in law infer an acceptation of that right and disposition made to her by her father, in satisfaction, as said is; she being the only bairn of the marriage, to whom it was provided betwixt her father and mother: unless it were alleged, that the daughter, after the father's decease, did recover decreets against the tenants of that land, for payment of the duties thereof, founded on that disposition.

Act. Sinclar and Dinmuire. *Alt.* Lockhart.

This seems somewhat contrary to Mr. David Thoires his case aforesaid. I have the Information thereof, &c.

Advocates' MS. folio 55.

1665. *December* 12. Jo. Ramsay *against* James Wilsone.

In a case betwixt Jo. Ramsay and Ja. Wilsone in Edinburgh, found that the dominion of moveables may be proven by witnesses; and that a naked possession of the same, without a title in the person of him who gave or sold them to the possessor, is not sufficient in law to establish a right.

Act. Wedderburne. *Alt.* Wallace.

Advocates' MS. folio 55.

1665. *December* 12. Kilbocho's Relict *against* The Children.

In a case betwixt the relict of Kilbocho and the children of that marriage, wherein she was provided to the hail conquest, the acquiring whereof did burden the heir with debt equivalent to the conquest; Found,—That was only conquest, whereof she behoved to have a liferent, which was acquired by her husband without contracting of debt; and conquest in this case of a liferent was only found ought to be understood which is free, *deducto ære alieno.*

Alleged, That as the heir of conquest will not be liable in payment of the debt till the heir of line be discussed, so no more could the relict be liable to the debt contracted for the conquest, but the heir declared liable in payment thereof, and she have the same free. On the other hand, contended that a terce of moveables and a terce of lands agreed in this, that as a relict could pretend no right to a third of moveables, but deducing debts, so no more can she in a terce of lands.

Act. Wedderburne, Lockhart. *Alt.* Wallace.

Advocates' MS. folio 55.

1665. *December* 20. Sir Thomas Nicolsone's Lady *against* Naper's Heirs Portioners.

Sir Thomas Nicolsone's lady, now Lady Prestoun, being provided to the annualrent of L.20,000 by her first husband, named Laper, or Naper, and convening the heirs portioners of her husband to pay it; Alleged, that they being heirs portioners, could not each one be liable *in solidum*, but only *pro æqua parte.*

Answer,—They behoved to be bound *in solidum*, at least *in quantum lucrati sunt* by their wives, who are heirs portioners served and retoured to their brother.

The Lords found the heirs portioners ought to be discussed once; and if they be insolvent, then to recur against the rest *in quantum lucrati sunt.*

Act. Wedderburne. *Alt.* Lockhart. *Advocates' MS. folio* 55.

1665. *December* 20. BOYDE *against* TAILZEFER.

IN the case betwixt Boyde and Tailzefer, a pupil being convened as behaving himself as heir by intromission, &c. because his tutor in his name did intromit, by giving discharges *nomine tutorio*; FOUND, This intromission of the tutor could not bind a passive title on the pupil, in respect *pupilli non habent animum gerendi se pro hærede*; but declared the tutor liable for what he had intromitted with, according to the extent thereof.

Act. Dinmuire. *Alt.* Maxwell. *Advocates' MS. folio* 55.

ABOUT this time also, FOUND, that one being infeft *cum curiis*, though base, may hold courts.

Act. Lockhart. *Alt.* M'Keinzie. *Advocates' MS. folio* 55.

1666. *January* 1. LADY BUTE'S Chaplain *against* Her SON.

THE lady Bute, after proclamation with her own chaplain, gave a discharge of the half of her jointure in favours of her own son. The chaplain, after the marriage, reducing this discharge, because granted after the proclamation of the bands of marriage betwixt him and her; by which the lieges were put *in mala fide* to contract with her to his prejudice; and she not being *sui juris* the time of the discharge, it cannot bind him:—

ANSWER,—He knew of that discharge the time of the granting thereof; and so he knowing, and not declaring his dissent before marriage, that must import ratification and homologation of that deed done by his wife, then his affianced spouse; because, *cum prohibere potuit non voluit*, and his silence imports a consent.

This the Lords repelled, and reduced the discharge, and noway found his knowledge to import a consent; for though he knew it, yet that cannot prejudge him in law from seeking the ordinary remedy in law, *viz.* to reduce; since, as he knew it, so he knew it to be null, and noway obligatory.

Act. Maxwell. *Alt.* Wedderburne. *Advocates' MS. folio* 55.

1666. *January* 20. STEVIN *against* YOUNG.

IN this case, Stevin and Young and Barnes, the relict, FOUND that their being but one daughter gotten of a marriage to whom sums of money were provided by the contract, that this daughter could not be served heir of that marriage; there

being a son begotten by the father in another marriage, who could only be charged to enter heir to his father, to the effect he might employ the sums of money provided to that daughter; and that the said daughter being served heir, her service was null. *Item*, FOUND that the mother dying, though *regulariter non debetur legitima ex parte matris*, yet the mother's testament being confirmed though she had a husband living, the child behoved to have not only the third, which belonged to herself, but also the third belonging to her dead mother; not as *legitima*, but as the third which belonged to the child by the father's decease, which came in place of the mother's third.

Act. Sinclar and Dinmuire. *Alt.* Lockhart.

Advocates' MS. folio 55.

1666. *January* 15. Jo. SCOT *against* HOG.

IN a case betwixt Jo. Scot, the Sawcer of Edinburgh, and one Hog, FOUND that the principal lands being disponed by a base infeftment, and other lands in warrandice also base, and the acquirer of the lands being in possession thirty or forty years, and thereafter being evicted from him by a decreet; the said acquirer has recourse to the warrandice: though the heritor thereof alleged he could not call for the mails and duties of the warrandice, because he stood infeft in these lands by a public infeftment, holden of the superior, by virtue whereof he and his authors had been thirty or forty years in possession but interruption.

REPLY,—The pursuer being infeft, though base, in the principal and warrandice lands, long before this public right, and being in possession of the principal lands long before the defender's right, his possession of the principal must be reputed as possession of the warrandice; and so *fictione juris*, he being prior both in right and in possession, he ought to have a sentence against the tenants of the warrandice.

The Lords having gravely considered this case, both the importance, difficulty, and inconveniences of it, found, that though the defender's right was public, and clad with possession long before the pursuer's right, yet he ought to be preferred to the mails and duties of the warrandice lands, &c.

Act. Lockhart. *Alt.* Cunyghame. *Advocates' MS. folio* 55.

1666. *February* 12. LORD LEE *against* PORTEOUS.

MY Lord Lee having bought the lands of Symonton, with the burden of some wadsets, in the which wadsets it is provided that after redemption the wadsetter should have a five years tack of the land for payment of a small duty, far within the rent of the money; and my Lord, having redeemed the wadset to which five years tack is subjoined, did raise a reduction on the old act of Parliament made in King James II.'s Parl. 6. cap. 19. declaring all tacks set for half mail or nearly, not obliging. Against this

ALLEGED, That that act was totally in desuetude, and tacks subjoined to wadsets have constantly been reputed valid notwithstanding that act of Parliament. ANSWER, Though persons have bruiked tacks without controlment past memory of man, yet the act of Parliament standing unrepealed, and it never having been questioned if sic tacks were valid or not; unless it were alleged, That by former decisions *in foro contradictorio* tacks of this kind were sustained, there is no reason why the act of Parliament should not be kept, considering the equity and justice of it.

The Lords reduced the tack and revived the force of that old act of Parliament. Which was well decided.

Act. Lockhart. *Alt.* Maxwell. *Advocates' MS. folio* 55.

1666. *February* 15. LORD BORTHWICK *against* ————

IN this case of my Lord Borthwick with some of his wadsetters, found, though by the act of debtor and creditor the wadsetter is bound to count for the duties of lands more nor pays him his annualrent, yet that the wadsetter is not bound thereto from the date of the act of Parliament, but from the time the debtor requires the creditor to accept of security for his money; at which time the creditor may declare himself either to retain his possession or to quit it. And found that paragraph of the act conditional.

Item, found a party could not renounce the benefit introduced in their favours by a public law, before the law was made.

Act. Cunyghame. *Alt.* Trotter. *Advocates' MS. folio* 56.

1666. *February* 15. ALEXANDER *against* THOMAS COULL.

IN this case of Alexander and Thomas Coull, found, that where one is in possession of lands, though by a right thereafter reduced, yet that the possessor is not liable for the mails and duties but from the decreet of reduction, and not from the time of the citation: though the decreet bear the right to have been from the beginning, and in all time coming null; which is only *stilus curiæ*.

Act. Yeoman. *Alt.* Dinmuire. *Advocates' MS. folio* 56.

1666. *June* 20. JEAN CUNYGHAME *against* CUNYGHAME of Robertland.

IN a case betwixt Jean Cunyghame, as donater to Sir David Cunyghame of Robertland's escheat and liferent, against this Robertland, found, That though Sir David had his wife and family in Scotland, yet being furth of the country,

and being denounced at the market-cross of Edinburgh, pier and shore of Leith, and registrate; his liferent escheat fell to the King.

Act. Mackeinzie. *Alt.* Cunyghame. *Advocates' MS. folio* 56.

1666. *July* 12. Anent PRESCRIPTION.

ONE being infeft in an annualrent, and having obtained decreet for poinding of the ground, against the tenants, without calling of the heritor; this decreet was sustained as a sufficient interruption of the prescription of the right, though the heritor was not called.

Advocates' MS. folio 56.

1666. *July* 12. Anent NOTARS.

CO-NOTARS subscribing a bond, or assignation, or writ of importance, *diversis temporibus*, and not *unico contextu*, it is null *ipso jure*; and it was contraverted if the subscription by one notar may stand good for L.100, and the other's subscription for another L.100, though at divers times.

Act. Lockhart. *Alt.* Sinclar.

Advocates' MS. folio 56.

1666. *July* 12. Anent ESCHEAT.

ONE being condemned by an assize for receipt of theft, and the Judge having mitigated the punishment to L.100 Sterling, to be paid within twenty-four hours; and being so paid, one takes the gift of his escheat, and craving declarator, it came to be debated if the verdict of one assize could be a ground of escheat, and if a judge might mitigate the punishment which is imposed by law, *viz.* hanging, and confiscate his moveables, or irrogat a mulct, in lieu thereof; and if the king may be prejudged of that casuality of escheat by this mitigation of the pain. CONTENDED *nemo debet subjici duplici pœnæ*; and the pain being declared by the judge to be L.100 Sterling, his moveables cannot now be confiscated, nor escheat declared, on that ground.

This the Lords repelled, and found no Judge Ordinary could mitigate the punishment irrogat by act of Parliament, and therefore declared the gift.

Act. Lockhart. *Alt.* Cunyghame.

Advocates' MS. folio 56.

1666. *July* 12. BRUCE *against* STEWART.

IN this cause, found that a clause on a margin of a bond or contract, is not obligatory if not subscribed; but if the granter of the bond write on the margin with his own hand, (so that the body of the bond and the clause in the margin be holograph,) though he subscribe it not, it will be more dubious if that clause marginal be obligatory or not: as in the case of the bond of provision granted by the *Laird of Durie* to his daughter: which is not decided.

Act. Lockhart. *Alt.* Sinclar.

Advocates' MS. folio 56.

1666. *July* 20. JACK *against* JACK.

IN this case, found that all assignations granted by a father to his children, even though not *aliunde* provided, and albeit not known to be bankrupt, being made after debt contracted by him, are null by the act 1621: or if the assignation or bond was granted by a third party, by the father's means and moyen to his children, they being *in familia*, found it to be a donation, and in that same case as if it were made by the father, and subject to the payment of the father's debts. Also found, that a creditor having comprised the fee of that sum from the bairns was also null *in consequentia*; but this last was not reported; whereas the Lords inclined that if the children, who were fiars of the sum granted to them by their father, had for an onerous cause assigned or disponed that fee to their creditors before the reduction, that then the same would not fall *in consequentia*. For they found a great difference, by the act of Parliament, of dispositions made by a conjunct person to his creditors, and of comprisings led against them at the instance of creditors; and that though a right may be reduced, upon the act of Parliament so long as it stands in the person of the children, as being conjunct persons: and yet if it be disponed to creditors by the children, they found it not to fall under the compass of the act of Parliament, but found it more favourable in the creditor's person. But why a creditor comprises ought not to be as favourable, I see no reason: but the reason it seems is the express tenor of the act of Parliament.

Act. Lockhart. *Alt.* Wedderburne, Mackeinzie, and Dinmuire.

Advocates' MS. folio 56.

1666. *November* 10. DOUNIE *against* YOUNG.

IN this case found, That an executor recovering a sentence in his own lifetime, albeit he get no payment nor intromit with the sum decerned, yet that sentence makes the testament to be *executum in quantum*; and there is no place to a *dative*

quoad non executa, albeit the executor was but a stranger and had not *jus sanguinis*.

Act. Wallace. *Alt.* Lockhart. *Advocates' MS. folio* 56.

1666. *November* 10. ARCHBISHOP OF ST. ANDROIS *against* HIS TACKSMEN.

IN this case found, That the act of Parliament declaring all valuations and decreets of Plat null, deduced since the 1637, did put the intromitters with the teinds *in mala fide* to pay to any other, albeit they paid by virtue of a sentence.

Act. Sinclar. *Alt.* Beton. *Advocates' MS. folio* 56.

1666. *December* 20. HAY of Knockhoudie *against* JOHN LITLEJOHN.

JOHN LITLEJOHN, merchant in Edinburgh, having comprised the liferent of a tenement in Leith, which being ruinous did thereafter fall; by which another tenement lying adjacent, belonging to Hay of Knockhoudie, was damnified in the sum of three or four hundred merks; after trial by the Dean of Guild and Council of Edinburgh, being found to be no less; for which Knockhoudie raises summons for payment of that sum, as the damage and interest sustained by him through the fall of his house.

ALLEGED, That he having comprised but the liferent of that house, his right was but temporary, and the heritor only could be convened to pay the sum acclaimed.

The Lords found the compriser of the liferent liable for this damage, reserving action to him against the heritor and liferenter for his relief.

Act. Norvell. *Alt.* Lockhart. *Advocates' MS. folio* 56.

[See the conclusion of this case, *infra*, page 441.]

1666. *December* 20. LYELL *against* BRAND.

LYELL, a chapman, having deposited his pack *custodiæ causa* with Brand, a merchant in Dundee, from whom he also borrowed L. 5 Sterling: and Brand, after the chapman's absence by the space of a month, having by warrant of a bailie opened the pack and inventoried the same, but without any sentence recovered against the chapman for payment of the L. 5; and being pursued for spulyie of the pack, he ALLEGED, That the chapman being his debtor, he did only sight the pack, to see what he had for his money, but noways alleged the pack was impignorat to him for his security; and being done *authore prætore*, it ought to

liberate him from a spulyie. The chapman was content to restrict the spulyie to vitious intromission, providing he gave *juramentum in litem.*

The Lords found the libel ought to be restricted; but in respect the pack was closed, and so delivered to the defender, and only depositat *custodiæ causa,* and not impignorat, and that it was impossible to prove the libel otherways nor by the pursuer's oath, they allowed him *juramentum in litem.* This may seem strange, how the Lords could allow this kind of oath, which is only in spulyies, and in no other actions, and which *extra* that particular case is not approven in law; being *juramentum affectionis,* and not *pretii et valoris.* But the Lords reserved the modification to themselves, at the advising of the cause.

Act. Dinmuire. *Alt.* Mackeinzie and Colvill.

Advocates' MS. folio 56.

1667. *January* 8. TYRIE *against* OGILBIE of Milnetoune.

THE case was thus: Park being debtor to David Tyrie in L.1000, and having purchased an assignation to a debt owing by Ogilbie of Milnetoune to John Rynd; and of the which debt, Park, by a bond of relief, was bound to relieve the Laird of Milnetoune; and Park having taken the assignation blank, he fills up Tyrie's name in it; who, charging Milnetoune to pay the sum, he suspends on this reason,—That the assignation was procured by the means and moyen of Park, and delivered to Tyrie blank, who filled up his name in it; and so being procured by his means, he offered to instruct instantly by writ that Park was obliged to relieve him of it.

The Lords found, where bonds of relief are granted by parties who thereafter purchase blank assignations to the same very debts which they are bound to relieve, that these assignations, though delivered to creditors for causes onerous, yet that they are in the same case as if they were in the person of him who is obliged in relief.

This may seem strange, that the assignee, who is creditor, and possibly *bona fide* granted discharge to the party from whom he got the assignation, should be prejudged by his fraud and cheat; but it seems to have much equity in it, and tends much to discourage fraudulent conveyances of rights, which both judges and lawyers ought mainly to regard.

Act. Dinmuire. *Alt.* Seaton. *Advocates' MS. folio* 57.

1667. *February.* PURVES *against* LORD COLVILL.

MY Lord Colvill holding his lands ward, and *moribundus et in lecto,* precipitates the marriage of his heir, that the casualty of the single avail thereof may not fall to the king and his donator; whereon Sir William Purves raises an action against this Lord, after the old Lord's decease, for the avail of his marriage.

ALLEGED,—The same did not fall, seeing by the law the marriage only falls when the apparent heir was unmarried the time of the vassal's decease.

REPLY,—Though it be true that the feudal law is such, yet both in law, reason, and practique, (Skene, *in notis Latinis ad cap.* 91 *Quoniam attachiamenti,)* where the vassal *dolose* precipitates his apparent heir's marriage, when he is on death-bed, his dole cannot prejudge the superior, since there ought to be the greatest faith and honesty betwixt vassal and superior imaginable; and therefore the precipitation makes it as if it had not been done, being done fraudulently as said is. *Vide February* 1676, *No.* 471, *parag.* 7. There were no practiques produced for the case, only one in Skene's time, and another in Balfour's time; and Craig (tit. 52, cap. 15, page 301, *in initio)* was alleged for it. However, the Lords found the reply and libel relevant.

The Laird of Ruthven's case differed something from this; for though young Ruthven was married that same day his father died, yet there was a previous treaty and articles agreed upon when the old Laird was in perfect health; and the suddenty of his sickness occasioned the precipitation of the marriage, though agreed and resolved on before. This was not decided. But these cases were never drawn in question before this time, and precipitations of this kind were ordinary to shun the falling of the marriage; and it is very like the Lords would not have sustained it, if there had not been produced former decisions of the case.

And since all thir, there is another case emergent, not unlike, which is:—Jo. Kinlock dispones the lands of Jourdie to his son David, who is not married, and resigns in the superior's hands, and on the morrow after he dies; but was not infeft. For since the law is, that the marriage of the apparent heir is only due, and if the heir be infeft before the vassal's decease, it saves the marriage; the question will be, if the precipitation of an infeftment proceeding on the vassal's resignation when he was *moribundus*, will undergo that same fate before the Lords as the precipitation of the marriage. But this case is not tabled yet.

Advocates' MS. folio 57.

1667. *January* 31. LYELL *against* ———.

SOME Merchants in Dundee, having sold to Spruce, Englishman, 60 tons of wine, for which he paid L.30 Sterling, in part of payment, and took their receipt relative to the bargain. They draw bills of exchange on him for L.120 Sterling, but without relation to the bargain. Spruce, before payment of the rest of the price, absents himself, and assigns the bill of exchange as if it had been a bill of credit; and the drawers being convened for payment, ALLEGED the cedent was debtor *ab ante* to the drawers for the price of wines; which was found relevant: so that the question was, how this debt should be proven against Spruce; for the merchants neglected to take writ of him, and the bills had no relation to the bargain.

ALLEGED,—That it being betwixt merchant and merchant, *lege mercatoria* it must be proven by witnesses. On the other hand CONTENDED, it being a bargain of importance of L.1000 Sterling, the same, of the law, cannot be proven

but *scripto vel juramento.* If Spruce had been present, they would have referred the truth of the bargain to his oath; or if they had had only to do with Spruce, they would have gotten him holden as confessed; but the bills being assigned for a cause onerous, the assignee would not suffer the cedent to depone to his prejudice.

This case seemed to be very singular. The Lords were convinced there was a clear cheat in the thing, on Spruce's part, whereof Lyell was not free; and they knew not how to help the merchants and to preserve the law, whereby it is provided that nothing above L.100 Scots can be proven by witnesses. And yet seeing there was a double produced in process, attested by two notaries, of the receipt of L.30 relative to the bargain, the principal being in Spruce's own hands; therefore the Lords ordained him to be cited to produce the principal, with certification that if he did not, they would hold that double produced as relevant to infer the bargain above written: which wants not its own difficulties.

Act. Dinmuire. *Alt.* Wallace. *Advocates' MS. folio* 57.

1667. *June* 10. CAPTAIN JOHNSTON *against* JAMES CUNYGHAME.

THERE is a bond granted by James Cunyghame to Captain Johnston and Janet Cunyghame his wife, for the sum of ———, &c. payable to them, their heirs, executors, and assignees, bearing annualrent to the term and thereafter. After the wife's decease, Johnston charging the debtor, he suspends; at the discussing, compearance is made by Janet Cunyghame's executors, who claimed the half of the sum charged for, because, by the conception of the bond, the sum being payable to their heirs jointly, the same ought to divide; specially the sum being moveable, whereas in heritage it is otherwise, and belongs to the man, as *dignior persona;* for which there was adduced a practique *in anno* 1623, betwixt *Dougall and Hendersone.* The Lords found the sum wholly to belong to the man, and no part of it to the wife's executors.

Act. Cunyghame and Dinmuire. *Alt.* Brown. *Advocates' MS. folio* 58.

1667. *June* 20. NIMMO *against* THOMAS MURRAY and his CURATORS.

ONE Nimmo having lent to Thomas Murray and his curators 1000 merks, which bond was subscribed by the minor and his curators; Nimmo charging them to pay, he suspends on this reason, that the bond cannot tie him by a payment, because he being minor, he must prove that it was in *rem ejus versum,* otherwise the granting of the bond by him and his curators is null, as granted by him in his minority to his lesion.

ANSWER,—The bond was good, because minors, with consent of their curators, subscribing bonds, they are effectual in law; and that it was not proper for the

creditor either to allege or to prove it was in *rem minoris versum*, seeing no credit would be given to minors, nor no traffic could be held with them hereafter.

The Lords found the creditor behoved to say the sum lent was *in rem versum*, otherwise that they would suspend the letters simpliciter, notwithstanding the bond was signed by the minor and his curators.

Many of the Lords were of another mind; especially my Lord Advocate.

Act. Sinclar. *Alt.* Lockhart. *Advocates' MS. folio* 58.

1667. *June* 29. Jo. LIDDELL *against* THE HERITORS of Fordungennie.

MR. JO. LIDDELL being in March 1667, transported from the parish of Fordungennie to Scoone, and charging the heritors for the half year's stipend due from Martinmas 1666 to Whitsunday 1667, my Lord Advocate, who heard the cause, was of opinion that he could not have that half year's stipend from which he was transported, because it inferred plurality of benefices, which was reprobated by the canon law, and that he could not be minister at both kirks. Urged on the other hand, a minister was not in the case of a liferenter, who dying before the term, had no right. And yet the Lords in the very like case betwixt Mr. Thomas Kirkcaldie and the heritors of Carnwath, found the minister to have right to both stipends, and that it did not infer plurality of benefices.

Act. Dinmuire. *Alt.* Lockhart. *Advocates' MS. folio* 58.

The same minister pursuing for the price of his house, which he had builded by order from the bishop, after a previous visitation; ALLEGED, by act of Parliament, the heritors having made the manse once free, the minister was bound to uphold it on his own charges; and having ruined by the fault of the last incumbent, he ought to pursue him and his representatives.

The Lords inclined to make the heritors liable for the superplus of 500 merks, being 1000 merks.

Advocates' MS. folio 58.

1667. *January* —, and *June* 29. ADAM STEVIN *against* BAILIE BOYD.

January.—BAILIE BOYD being pursued by his stepson, Adam Stevin, for count, reckoning, and payment-making to him of his portion natural, the Bailie being his tutor and curator:—

Wherein the Lords found a tutor not liable in diligence for such debts as either the debtor thereof was known to be irresponsal, or were so reputed and holden the time of his office; because he was not bound to expend his pupil's estate unprofitably, or whereof he would get no allowance, nor was he bound to expend his own. And they found this allegeance relevant to be proven *prout*

de jure, was *negativum circum scriptum*, and resolved in a positive; but what length of diligence he was tied to, whether decreet, horning, and caption, as to moveables, and comprising as to heritage, they have not as yet determined. For in law *tutores tenentur de culpa levi et lata*, but not *levissima*.

Act. Dinmuire. *Alt.* Lockhart.

Advocates' MS. folio 57.

June 29.—In the foresaid cause, Bailie Boyd and his stepson, 1*mo*, Found that a tutor is not bound in diligence against irresponsal debtors, whether absolutely so, or so reputed and holden. 2*do*, They found that irresponsality probable *prout de jure*. 3*tio*, They found the burden of the probation of irresponsality incumbent to the tutor who alleged the same. 4*to*, They found tutors liable in this length of diligence, viz. horning, caption, and poinding, for moveables, and apprising for heritage and lands. 5*to*, They found the tutor liable in annualrents for debts not bearing annualrent, and that within a year after the confirming of the father's testament wherein the pupil was executor. 6*to*, They found that legacies paid by the tutor, though without a sentence, relevant to exoner him, if they were due in law. All thir points were discussed *in præsentia, referente Domino Newbyth.*

Act. Dinmuire. *Alt.* Lockhart.

Advocates' MS. folio 58.

1667. *December.*

A SUM of money being provided to a man and his wife, and their heirs; which failing, to the longest liver of them two; FOUND, The heir of the marriage is fiar.

Advocates' MS. folio 59.

1666, 1667, and 1668. The TOWN of DUNDEE *against* The TOWN of ARBROATH.

1666. *December* 20. The bailies of Aberbrothock having borrowed some cannons from their neighbours in Dundee, for defence of their town against the English, *in anno* 1651, for which they gave bond either to deliver the same unhurt, or else to pay 500 merks as their price; and the hail maritime towns of Angus being subdued, thir cannons were taken away *vi majore*. Whereon the merchants of Dundee having charged the Arbroathmen either to deliver or to pay the 500 merks, they suspend on this reason, that by the bond it is clear to be *contractus commodati;* by the nature of which contract, *commodatarius non tenetur prestare casus fortuitos, nisi culpa precedat casum;* and the cannons being taken away without any fault of theirs they cannot be liable to the sum charged for.

ANSWER,—Here *pacto susceperant in se casum fortuitum*, and so must be liable for the same, though by the nature of *commodatum* they would not be liable;

for here, in case of failyie of redelivery, they oblige them to pay 500 merks as the price.

The Lords found the reason of suspension relevant to assoilyie them, unless the chargers would condescend on some neglect on their part to deliver the cannon; and found them not liable to pay the price contained in the bond, which was rather adjected *nomine pœnæ*.

Act. Balfour and M'Keinzie. *Alt.* Lockhart and Dinmuire.

Advocates' MS. folio 57.

1668. *November* 1. Thereafter this cause came to be debated in P. D. upon the clause contained in the bond, that they should deliver the guns without any hurt or scaith, which comprehends fortuitous cases *præter naturam commodati.*

2do, ALLEGED,—This was not *commodatum simplex et regulare, but æstimatum,* where *per L.* 3. *D. commodati omne damnum est præstandum.*

The Lords found that clause in the bond, "without hurt or scaith," did not comprehend fortuitous cases; and that it was not *commodatum æstimatum* properly, but a liquidation of the value in case of scaith, for *in commodato æstimato pretium est in traditione.*

Advocates' MS. folio 57.

1667. *December.*—In the forementioned case betwixt some honest men in Dundee and Arbroath, the question ran, whether the bond granted by Arbroath was *commodatum* or *mutuum.*

The Lords found it was conceived in the terms of a *commodatum;* and the said *vis major* being *casus fortuitus,* Arbroath was not bound *præstare istum casum, nisi culpa precesserit casum.* They also found they were bound, *ex natura commodati, in exactissimam diligentiam* for preservation of the guns. And in suit of this question, there did arise another, *viz.* if the diligence required behoved to be antecedent to the fortuitous case or subsequent, the obligation to do diligence for recovery thereof still remaining after that accident. Thus Arbroath were forced to condescend on some acts of diligence; and the Lords before answer ordained Dundee to condescend on particular acts of neglect: and then to consider, at the advising of the cause, if the diligence done was relevant to assoilyie from restitution.

Then on Nov. 1668, when thir diligences came to be advised, the cause was again debated on the clause of the bond, and the nature of *commodatum æstimatum:* after which, the Lords found as is before set down.

Advocates' MS. folio 59.

1668. *January* 4. —— KER'S CREDITORS *against* JAMES KER.

KER having granted a disposition to Ja. Ker of some bonds, for security of several sums of money, as 3000 merks, 9000 merks, &c. whereon the creditor being infeft, and that infeftment made public, as to some of the sums therein contained, but not as to all: thereafter, there being a competition of rights be-

twixt this Ker and some others of the disponer's creditors, the question was, If an infeftment, granted for several sums of money, and made public as to some of the sums, if that was a public infeftment.

The Lords found that an infeftment being indivisible *quid*, could not *ex parte* be public, and *ex parte* not; and therefore found the same public.

Act. Sinclar. *Alt.* Lermont. *Referente Domino Advocato.*

Advocates' MS. folio 59.

1668. *January* 20. LORD LYON *against* ———.

THERE was a comprising led at my Lord Lyon's instance against one Johnston, as lawfully charged to enter heir to his father: and he dying before the Lyon was infeft upon his comprising, another serves himself heir to him who was last infeft, and procures himself infeft; and both contending for preference, it was found that the person who was lawfully charged to enter heir, and comprised from, was so denuded by that diligence, that he who served himself heir, and was infeft, could not be preferred to him who had comprised, though not infeft till after the other's infeftment was expede.

Act. Maxwell. *Alt.* Lockhart. *Referente Advocato.*

Advocates' MS. folio 59.

1668. *January* 24. BOWAR *against* GRAHAME, minister at Inneraritie.

THEY found that the relict of the deceased minister might convene the entrant or the heritors for the price of the manse, either built or repaired; notwithstanding the act of Parliament 1661 be expressed that the heritors ought to be bound and liable for that. It is true, before that act of Parliament entrants were infallibly liable to the relict or heritors; and that act does not exclude the entrants from being liable, though it declares the heritors to be bound, and makes no mention of entrant ministers.

Act. Dinmuire. *Alt.* Thoires. *Referente D. Staires.*

Advocates' MS. folio 59.

1668. *February* 4.

ONE Mr. Wm. Somervell being condemned in a criminal court for usury, and having raised a reduction of the verdict of the assize, before the Lords of Session,

on error and iniquity committed by them; it came to be debated, if the verdict of an assize might be reduced on that ground before the Lords.

CONTENDED,—The Justice-depute being a Judge distinct and independent from the civil Judge, and the verdict of an assize being a sovereign sentence of a criminal Court, it could not fall under the compass of the Lords of the Session, or their review; and it is a novelty, and of a dangerous consequence, to reduce the verdict of a criminal assize. On the other hand ALLEGED,—That they craved only the verdict to be reduced as to the civil effects of it, and not as to the criminal.

This was an action extraordinary, and never heard of before; the same came not to a sentence, but was agreed.

Act. Harper and Wallace. *Alt.* Lockhart.

Advocates' MS. folio 59.

1668. *February* 4. FARQUHAR *against* FARQUHAR.

PATRICK FARQUHAR being engaged in several sums of money, as cautioner for Sir Robert Farquhar, he raises reduction of these bonds as done by him in his minority and to his lesion.

ALLEGED, *Esto* he were minor and lesed, yet after he was major he had homologated these bonds, in so far as he was pursuing Sir Robert, the principal, his heirs, for his relief, and had gotten decreet *cognitionis causa*, and was to adjudge his estate therefore.

ANSWER,—Nothing could be called a homologation but an express approbation, or payment of annualrent, after he was major: because the event of the reduction might be dubious, and might take a time before it might be closed; and in the interim, the other creditors might prevene him in diligence, and prejudge him of his relief.

This was not decided. Nor do I remember that ever that point came to be debated before, If a major's craving relief of a debt contracted by him in his minority will import an homologation.

In this same process, found that women could not be adduced to prove minority. Likeas there was a joint probation allowed to the pursuer and defender.

Act. Lockhart. *Alt.* Dinmuire.

Advocates' MS. folio 59.

1668. *February* 4. LADY CARLIPS *against* The LAIRD of Posso.

IN the case betwixt Lady Carlips and the Laird of Posso, it was found, that as an apparent heir, by the late act of Parliament, cannot buy an apprising of his father's estate, without being made liable to his father's debts, so the Lords did extend this statute to apparent heirs who buy comprisings against their father's

estate even while their father is in life. Which was well decided; because it is presumed to be bought with the father's means.

See *Mascardus de Probationibus, verbo,* Bona conclusione, 221.

Act. Cunyghame. *Alt.* Lockhart.

Advocates' MS. folio 59.

1668. *February* 4. Anent WARDHOLDINGS.

As vassals of ward-lands may feu their lands without their superior's consent, so they who hold lands ward of subjects may do the same; albeit, the act of Parliament be only express as to lands holding ward of the king.

Act. Wallace. *Alt.* Lockhart.

Advocates' MS. folio 59.

1668. *February* 4. Anent COMMONTIES.

THE Laird of Haining being infeft in the lands of Haining, with its parts and pertinents, *cum pascuis et pasturis,* but not *cum communi pastura;* holding feu of the king; and the town of Selkirk, by their charter of erection, granted to them by the king, being specially infeft in the muir, as the commonty of their town: and both pursuing molestations against others,

The Lords found that Haining being infeft *cum pascuis,* &c. and in possession of pasturage past memory of man, he had right to pasture there, but not to cast feal and divot. But if he had been infeft *cum communi pastura,* and so in possession, The Lords declared, that having right of pasturage, the right of casting had been included; because *major servitus includit minorem:* and that *cum pascuis, &c.* in Haining's charter, did relate to the lands, but not to the commonty.

Act. Wallace. *Alt.* Wedderburne.

Advocates' MS. folio 59.

1668. *February* 24. HENDERSON *against* HENDERSON.

HENDERSON having disponed some tenements of land to another, so called; in the narratory part of the which disposition, the consideration of his mortality, and his going off the country are the impulsive causes of the right: and it had the common style of a testament; but thereafter, in the body of it, he assignees him to the mails and duties, and gives him power to dispone thereon; and contains

a procuratory to resign, and warrandice. It was doubted if this was *habilis modus*, to convey heritage, or if it was a testamentary disposition.

The Lords found it had the force of a disposition, but withal it was revocable by the disponer: and because this right was made when he was going off the country, they found that his heir proving that it was in his hands, after his return, the same was a tacit revocation thereof, and so found it to belong to the heir; and yet they found it probable by witnesses, that he gave warrant to deliver it to the defender.

Act. Sinclar. *Alt.* Lockhart.

Advocates' MS. folio 59.

1667, *January* 31, and 1668, *February* 24. LADY MILNETOUNE *against* The LAIRD.

1667. *January* 31.—The Lady Milnetoune being married to Maxwell of Calderhall, her second husband: who disagreeing with her, she sells her liferent to her step-son, Sir Walter Whytford of Milnetoune: and he having before that disposition fallen in adultery, she pursues a divorce, and gets it, upon the probation of one single witness, and a number of concurring pregnant presumptions; wherein there was compearance, and witnesses adduced. Which decreet being thereafter called in question before the Lords, it was

ALLEGED,—That one single witness could not prove. *2do*, That the witnesses adduced were bribed, and got money to depone; so the question was, If *singularis testis*, in crimes, might prove. *2do*, If witnesses once adduced and received in judgment without any exception or objection *in prima instantia*, may be quarreled *in secunda*, as to reduce the decreet.

The Lords found, that one single witness, with the presumptions, was relevant; and the rather, because it was known that Calderhall was a most vicious man; and as to the witnesses, they found it not competent now to make that a ground of reduction, but reserved reprobator to them on that head. *Vide infra* 24th February, 1668, thir same parties.

It may seem hard that when objections are omitted against witnesses which were not competent *in prima instantia*, being *noviter veniens ad notitiam*, that they should not be received *in secunda*.

But the notoriety of the thing induced the Lords thus to decide, and that the poor gentlewoman was reduced to great poverty.

Act. Cunyghame. *Alt.* Lockhart.

Advocates' MS. folio 57.

1668. *February* 24.—The Lady Milnetoune having got a divorce from her husband upon adultery, which was proven by witnesses who were alleged to be bribed by the Lady; this common objection against witnesses being omitted in the divorce, there is a reduction raised of this decreet on this ground, that the witnesses were corrupted; and the action was a reprobator of the witnesses upon whose deposition divorce

followed, and the questions ran, 1*mo*, If in law the depositions of witnesses might be reprobated *quoad dicta et testimonia testium* or only *quoad initialia;* as the objections against the inhability of witnesses being omitted in *prima instantia*, they might be reprobated in *secunda*. 2*do*, If the witnesses might be only punished in their persons, or if the sentence which followed on their depositions ought to fall; and what effect the probation of a reprobator of witnesses has in law.

Vide No. 307. [20*th* January, 1672.]

Act. Lockhart. *Alt.* Mackeinzie.

Advocates' MS. folio 59.

1668. *June.* The EARL of CRAWFORD *against* SIR JAMES STEWART.

SIR JAMES STEWART, Provost, being pursued by the Earl of Crawford to count for his intromission with the public monies; he obtruded the act of indemnity *in anno* 1661, whereby all men are discharged of all actions, crimes, &c. except usury, and such who meddled with the public monies, and who had not counted therefore, nor were discharged by the pretended authority for the time. But so it is, alleged Sir James, he had counted with the usurpers already, &c.

The Lords of Exchequer found the act of Parliament did not defend him.

Act. Wallace. *Alt.* Lockhart.

Advocates' MS. folio 60.

1668. *June.* The EARL of DUMFRIES *against* The LAIRD of WAMPHRAY.

IN a case between Dumfries and Wamphray, FOUND that a woman's liferent, belonging to her husband *jure mariti*, did fall both under the man's single escheat, and that it might be comprised from him; because a liferent having a tract of time, and being in *cursu*, was real. And yet if the *jus mariti* had been comprised before the man was rebel at the horn, the compriser had been preferred.

Act. Maxwell. *Alt.* Dunmuire.

Advocates' MS. folio 60.

1669. *January.* AYTOUN *against* ———

A sum of money being due to one Aytoun by an heritable security, and failyieing of heirs of her body it was provided to her sister; and in the contract of marriage betwixt this Aytoun and her husband, the said parties espoused jointly grant a discharge to the debtor, of the heritable sum; and in that same contract, the debtor grants a new security, also heritable as the former, to the man, and rela-

tive to the former security. It falls out, the woman dies within year and day, without children, and leaves her husband her executor and universal legatar; and the heir of the wife craving repetition of the sum given *nomine dotis*, the question was, If the discharge given to the debtor of the security when it stood in the terms foresaid, was an innovation thereof, so that it remained no more heritable, nor could be claimed as belonging to the wife's heirs: the man in effect having received it in his own name, he was only liable in repetition *condictione indebiti*; for if the man had died within year and day, the wife had nothing competent to her but this action of repetition, and which action must fall under her testament and executry; *item*, she might have disposed thereupon; like as *de facto* she has done, by the testament above written, in favours of her husband.

The Lords found the discharge an innovation, and that there was nothing competent to the wife but the said action of repetition, which was moveable, and fell under testament.

Act. Cunyghame. *Alt.* Lockhart.

Advocates' MS. folio 60.

1669. *January* 20. WAMPHRAY *against* his MOTHER-IN-LAW.

IN this cause found, that an instrument of kenning to a terce, needed not to be registrate as other seasines mentioned in the act of Parliament: and that a right of terce is drawn back to the time of the defunct's decease, though the relict be not kenned a long time thereafter; and yet if a third party *bona fide* meddled with the rent of the terce lands before the kenning, he will not be liable in restitution, but she will have action against the heir of the husband therefore.

Act. Lockhart and Dinmuire. *Alt.* Maxwell and Cunyghame.

Advocates' MS. folio 60.

1669. *February* 2. LORD LINLITHGOW *against* SIR WALTER SEATON.

MY Lord Linlithgow having purchased the lands of Medhope, and taken right to an expired comprising of the same for 3000 merks, and thereon having charged Sir Walter Seaton, the superior, to enter him; he craves the benefit of the act of Parliament, by which the superior may make an offer to pay the sums for which the lands were apprised.

The Lords inclined to cause Sir Walter enter the compriser, notwithstanding of the act of Parliament, and that the act was to be understood of comprisings yet running and not expired, and that the offer was not timeous nor the order prescribed by the act of Parliament kept.

Vide Durie, *5th March*, 1634, Black.

Act. Cunyghame. *Alt.* Sinclar. *Advocates' MS. folio* 60.

1669. *June* 10. LADY DUNDIE *against* Her TENANTS.

MY Lady Dundie being infeft in an annual-rent of ten chalders of victual, out of the Maines of Dudhop, *in anno* 1659, in contentation of former infeftments granted to her in 1650, 1651, and 1654, as remuneratory of the provisions contained in her contract of marriage in 1647; and pursuing a poinding of the ground; there is compearance made by Mr. James Brisbane and another creditor, both annual-renters, and infeft before the 1659, who contended for preference to my Lady; who urged, that her husband's possession was her possession before the 1659, and that they behoved to allege they were in possession before the 1650, 1651, &c. to which her infeftment in 1659 ought to be drawn back, as to the point of prelation of possession.

The Lords found her husband's possession her possession: but that the infeftment in 1659 could not be drawn back; in respect she had renounced all former infeftments, and accepted that ten chalders, &c. and the lands of Inverkeithing, in full contentation of all.

The information of this I have.

Act. Lockhart and Lermonth. *Alt.* Sinclar and Dunmuire.

Advocates' MS. folio 60.

1669. *June* 15. HAY of Knockhoudie *against* JOHN LITLEJOHN.

[*See the prior part of this Case*, supra, *page* 428.]

JO. LITLEJOHN having comprised the liferent of a tenement of land, called Babylon, in Leith, which being ruinous, fell and damnified the neighbour's tenement in 600 merks; for the which, the neighbours got sentence against the said Littlejohn, compriser of the liferent, reserving action against the heritor, as accords: and the heritor being convened, conform to this reservation,

The Lords found the liferenter and the compriser not liable in reparations of this kind, *et quæ habent causam perpetuam*; but only to keep the house water tight and wind tight; and therefore decerned.

Act. Lockhart and Dinmuire. *Alt.* Sinclar and Chalmer.

Advocates' MS. folio 60.

1669. *June* 15. KINLOCH *against* BROWN of Gorgie-mill.

IN a case betwixt Brown of Gorgie-mill and Kinloch, it came to be debated Whether a creditor obliging himself to use no execution against the debtor during his lifetime, may serve an inhibition against him, yea or no; and if that will come under the name of execution, or only of a diligence. It was found he might inhibit.

Advocates' MS. folio 60.

1669. *June* 24. Anent Wadsets.

In a debate betwixt ——— and ———, found that a ratification of a wadset, made before the act of Parliament anent debtor and creditor, is in effect a new wadset, and has that same effect in law that a wadset made after the act of Parliament has. For it is clear by the act of Parliament it is only understood of wadsets preceding the same; and that parties may take proper wadsets after the act, without any hazard of being countable for the superplus of the rents more nor exceeds the rent of the money, as formerly was in use before the act of Parliament.

Act. Sinclar. *Alt.* Lockart. *Advocates' MS. folio* 60.

1669. *July* 1. Anent Tutors.

The Lords found a tutor not liable in diligence to his pupil for sums belonging to the pupil, whereof the debtors are responsal, nor yet for annualrents of the annualrents of the principal sums, after the expiring of the tutory, providing the debtors be *solvendo*; for it is thought the pupil's advantage that the sums lie in a responsal man's hand, or that the tutor meddle not therewith, who may either misemploy it or become weak himself.

Advocates' MS. folio 61.

1669. *December* 1. Maitland of Pitreichie *against* The Laird of Geicht.

Maitland of Pitreichie pursuing a recognition of the Laird of Geicht's estate; alleged, the defenders purchased rights of that estate, according to the laws then in force, *viz.* an act of Parliament made in 1641, (it is the 58th act,) whereby vassals of wardlands were permitted to subinfeudate their wardlands, without the superior's consent, and yet not incur recognition; which act, though rescinded after in 1661, yet being *in observantia* at the time, and long thereafter, the defenders are sufficiently secured from this pursuit of recognition.

Replied,—That the Parliament, wherein that law was made, being declared void, and to have had no authority; that law could never defend against this pursuit; for there is a difference betwixt rescinding a particular statute made by lawful authority, and a rescinding the authority itself.

The Lords repelled the defence, and did recognosce. But they were equal in voices, and the President's vote did cast the balance. This might be convelled hereafter. [*See 8th July*, 1671, *thir same parties.*]

Act. Lockart. *Alt.* Cunyghame. *Advocates' MS. folio* 61.

1669. *December* 12. Kirk *against* Hay.

In this case the Lords sustained a pursuer's oath in supplement, taken by the commissaries, in a cause wherein there was only one singular witness, albeit the case was not a spulyie.

Act. Dinmuire. *Alt.* Leirmont. *Advocates' MS. folio* 61.

1666, and 1667. CRANSTON *against* WILKIESON.

1666. *January* 1.—IN this case, they found intromission had by a cedent with the goods and gear of the common debtor, long before any assignation, relevant to be proven *prout de jure*, and to take away a debt constituted by writ; on this ground, that the cedent by his universal intromission did represent the debtor, and so *confusione tollebatur obligatio.*

Act. Dinmuire. *Alt.* Birnie. *Advocates' MS. folio* 55.

1666. *July* 12.—In the said above written case, found, That where an heir being pursued by a creditor to pay a sum awarded by his predecessor, he could not object vitious intromission against the creditor, pursuer, *ad hoc* to extinguish his debt. But in case the pursuer did vitiously intromit, the Lords found him liable *pro tanto*; unless he had been convened as vitious intromitter, by way of action, before he pursued the heir for the debt.

Act. Dinmuire. *Alt.* Birnie. *Advocates' MS. folio* 56.

1667. *June* 29.—In the foresaid action betwixt Cranston and Wilkieson, found that Wilkieson being bound by contract of marriage betwixt him and Barbara Home, to infeft himself and his wife, the longest liver of them two, in conjunct fee or liferent, and the heirs gotten betwixt them in fee, which failyieing to the wife's heirs and assignees whatsomever; my Lord Stair, who only heard the cause, found that Cranstoun, who was the wife's heir, had no right to the tailyied lands, as heir to his mother, but that he behoved to be served heir of provision to Alexander Wilkieson the first tailyier. His reason was, because, if there had been bairns gotten of the marriage, the bairns behoved to be served heir to the father, and not to the mother, notwithstanding of the termination of the fee on the wife's heirs: so that during the non-existence of bairns of the marriage, the fee could not be pendulous, and hang in the air, but it behoved to inhere in some subject, either in the father or the mother. In the mother it could not; because if she had had a child to Wilkieson, he behoved to serve himself heir to his father, and not to his mother, and so he behoved to be fiar: and consequently Barbara Home's heir ought to be served heir of provision to him, and not to his mother; since the marriage betwixt the man and the wife dissolved without heirs or bairns. And so the case being a reduction at Wilkieson's heir of conquest his instance against Cranston, the wife's heir, my Lord Stair found he had no interest to reduce Cranston's right, as heir of conquest to Wilkieson; because he was but naked liferenter of that land, he dying without heirs of his own body: but withal found Cranston's right and infeftment, as heir to his mother, could not give him an interest to the land; but he behoved to be served heir of provision, as said is.

This decision of Stair I do not well understand; for Craig, in his diegesis *De conjunctis investituris*, says clearly, that in the conception of a tailyie in the terms foresaid, the wife is fiar, because of the termination. And when I alleged this to my Lord Stair, he said the Lords had decided contrary to Craig in several cases sincesyne; especially in a tailyie made by Sir Ja. Scott in favours of Sir Jo. Brown and Lady Rossie, where they found, though there was a child got betwixt them, yet that the Lady was fiar, and not Sir John, her father, who was but liferenter.

Now I see no material difference betwixt our case and that of Sir Jo. Brown's daughter. And how thir decisions stand, I apprehend not: for I put no doubt but Barbara Home, after her husband's decease without any heirs, might have sold it in her own lifetime; and if her son behoved to be served heir of provision to his stepfather, Wilkieson, then a creditor might have comprised it from Wilkieson; which would frustrate the tailyie.

In this same case, there was another question that arose from the conception of this infeftment, which was the termination on Barbara Home's heirs, and not on Barbara herself; which I conceived induced my Lord Stair to that decision; but really he might have given the Lords' answer on the conception of the infeftment, his opinion being contrary to Craig's, and seemingly contrary to the Lords' decisions in a case not unlike unto this. In this same contract, as this tenement was tailyied to the wife and her heirs, so by a clause subsequent, all lands, heritages, &c. to be conquest during the marriage were siclike provided: which, because there followed no infeftment on it, the Lords found furnished him only an action; and that the copulative particle, "and siclike," subjoined to the clause of tailyie immediately preceding, subjected that clause of the conquest to that same sense and interpretation.

The subject of tailyies I intend, God willing, to handle apart, for my own satisfaction.

Act. Birnie. *Alt.* Dinmuire. Mr. Alexander Gibson, *Clerk.*

Advocates' MS. folio 58.

1670. *January* 1. CRANSTON *against* SOMERVELL.

A decreet of removing being obtained by Thomas Cranston against Wilkieson, and being suspended on obedience, there was compearance made by one who was infeft long before, and whose right had been preferred in an action of maills and duties; and so contended, that as he was preferred in the maills and duties, so he had good interest to allege, in this suspension, why he ought not to suffer that tenant to remove, to the effect Cranston might get possession of the land, both being *in acquirenda possessione.*

The Lords found, notwithstanding of the diligence used by Cranston, who had used an order of warning against this tenant, and that the other had neglected it, yet that he ought to be admitted to debate upon his right with Cranston, so far as might be done in a possessory judgment. And because the seasine produced by Somervell, the other party, did not meet; therefore they preferred Cranston to the possession.

Act. Dinmuire. *Alt.* Birnie. *Advocates' MS. folio* 61.

1670. *January* 20. EARL of KINGHORNE *against* LAIRD of PITTARO.

THE deceased Earl of Kinghorne having left a bond blank in the creditor's name, in the hands of Alexander Keith, who was the Earl's agent, containing the sum of 1000 merks; this bond lay in Alexander's hands a long time while he was in life, and being found amongst his papers long after his decease, his wife delivers it to the Laird of Pittaro, who fills up his own name therein, and gets decreet against this Earl of Kinghorne, on the passive titles. Which being suspended, and the way of the conveyance of it being referred to Pittaro his oath, he confessed the truth of the business, in manner above narrated. Whereon the Lords assoilyied from the decreet: though it was ALLEGED that Alexander Keith was creditor to the Earl, and the Earl his debtor, in the like sum.

Act. Lockart. *Alt.* Cunyghame. *Advocates' MS. folio* 61.

1670. *February* 20. DAVID KINLOCH *against* JAMES OGILBIE of Clunie.

IN the case David Kinloch against James Ogilbie of Clunie, FOUND, A contravention of lawborrows may be turned in a declarator of property, where the deeds are not founded on violence, but on damage done to the property and lands. *Item*, That the penalty of contravention belongs to the heir of him who was infeft in the lands contraverted; and the charge being given by Bandoche's father, That the action of contravention did belong to his heir. But he was ordained to warrant the defender at the executor's hands.

Act. Dinmuire. *Alt.* Falconer. *Advocates' MS. folio* 61.

1670. *February* 20. LORD BALMERINO *against* the EARL of AIRLIE.

IN the reduction of the disposition of the whole estate of Couper, made by the deceased Lord Couper, in favours of his lady, now Lady Lundors, pursued by my Lord Balmerino *contra* the Earl of Airlie; FOUND that the reason of *lectus ægritudinis* was a privilege not personal, nor competent only to the apparent heir; but it was real, and competent likewise to the creditors of the apparent heir, who had comprised from him, as lawfully charged to enter heir. In this process also there was a large debate anent the nature of my Lord Couper's sickness, the time of his making the right aforesaid in favours of his lady; and whether the coming to kirk and market was the only allowable presumption in law of health, or if sanity might be made out by acts equipollent to going to kirk and market: the Informations whereof I have set down at large. Upon thir debates, the Lords have not as yet given their interlocutor.—There was a practique founded on, in the 1647, betwixt *Syme and Grahame*, which stumbled the Lords: which was

that they found a man's writing of two sheets of paper sensibly, and to good purpose, sufficient to sustain a disposition of his heritage made before, though they could not qualify he ever came to kirk and market thereafter; because they judged this equipollent thereto, and a manifest demonstration of *sanitas mentis*. As also, in *February*, 1668, in the action *Pargillis* against *Pargillis*, it was found that the riding on horseback, though the disponer was proven to be sick, and to have been supported on his horse, were sufficient qualifications of health: *ergo* going to kirk and market is not absolutely necessary for validating such dispositions. Yet all thir were answered; and it was farther urged, that on this consideration the Parliament had lately, in 1669, refused to allow parents the power of providing their younger children, (than which nothing imaginable can be more favourable,) to small portions on their deathbed. At last the Lords would find no acts equipollent to going to kirk and market; but that it behoved so to be done in *forma specifica*: and resolved they would make that a constant practick by which they would decide the like cases in all time coming.

Vide *infra* 11*th December*, 1677, *Lockhart, No.* 677;—*Stair's Decisions*, 3*d February* 1663, *Robertson and the Town of Lanerk.*

Advocates' MS. folio 61.

1669. *July* 28. WAUCHOP of Niddry, and his SON JO. WAUCHOP of Edmiston, *against* J. H. of Waughton, and ALEXANDER COCKBURNE of Popill, and the TENANTS of Popill.

THE Laird of Niddry having right by progress, from Raith of Edmiston, to the teinds, parsonage and vicarage, of the lands of Popill, (the conveyance whereof see *alibi* beside me,) pursueth the foresaid persons for payment-making to him as titular, or come in his place, of the valued bolls due furth of the said lands for the space of thirty years by-past. Against which it was ALLEGED, 1*mo*, There could be no process sustained against thir defenders, because the principal and original tack of the foresaid teinds, set by Claud, Commendator of Paisley, and Dean of Dunbar, to Sir George Hamilton, and Greinlaw, his son, is not produced.

ANSWERED and REPLIED,—That the allegeance ought to be repelled, in respect of the decreet of prorogation of that tack produced, which doth particularly mention the production of the foresaid tack before the commissioners of the Plat; which decreet of prorogation is dated the last of January 1678: by virtue whereof, the pursuers and their authors have been in possession of the said teinds past all memory.

DUPLIED,—The allegeance stands relevant, notwithstanding of the answer, in respect the prorogation takes not effect till the expiry of the principal tack; 2*do*, If the principal tack were produced, as it ought to be, there might arise intrinsic nullities therefrom, which might cast the tack itself.

TRIPLIED,—The defenders cannot be heard to propone any thing against the non-production of the tack; not only in respect the same is expressly mentioned in the foresaid decreet of prorogation, but also the same is homologated by the defenders, in so far as there was a decreet of valuation of the said teinds, against the pursuer and his authors; and they have been in use of payment of the valued

teind duty ever since: as also, there was a decreet of buying following thereupon.

QUADRUPLIED,—No respect can be had to the payment of the tack-duty and homologation inferred therefrom, except only as to these years, whereof the tack-duty was paid. *2do*, No respect can be had to the foresaid decreet of buying, to infer any homologation, unless the pursuer instruct a valid and sufficient right in his person to these teinds.

QUINTUPLIED,—That the hail dispute proponed by the defenders ought to be repelled, in respect of the foresaid decreet of prorogation produced, and which bears the production of the principal tack then, and so is *probatio probata*, and must be sufficient against thir defenders, who can pretend no right to thir teinds; and so the defences as to them are *jus tertii*, and the Lords' sentence will be to them a sufficient warrant.

The Lords' answer having been craved on this, they repelled the foresaid allegeance, duply, and quadruply, in respect of the reply, triply, and quintuply, made thereto, founded upon the foresaid decreet of prorogation produced; which mentions the foresaid tack and homologation of the same, by payment of the foresaid teind, at least the valued teind duties thereof.

Then it was farther ALLEGED for Waughton, that he ought to be assoilyied from the valued teind-duty of 1646, and all preceding crops, because the same were paid to the said umquhile Mr. Ja. Raith of Edmiston, the pursuer's author and cedent, conform to his discharge, dated the 7th of August, 1647. *2do*, The pursuers could not acclaim the valued duties for any years since the decreet of buying, but at most the annualrent of the price.

ANSWERED,—The first ought to be repelled, in respect of the discharge produced, which is only granted for the year 1646, to Jo. Johnston, tenant in Popill, but does not discharge preceding years. To the *2d*, Ought to be repelled, unless the price had been paid: and if this should be sustained, the titular should never get payment of the price, but only annualrent, after the decreet of buying; which were absurd.

REPLIED,—Albeit the preceding years be not discharged *per expressum*, (it being only a discharge to a tenant who paid the same, and possibly possessed only that year;) yet it must be presumed, that Waughton, the heritor, or his tenants, paid the preceding years: else Mr. Wm. Raith would not have received or discharged that year, but some preceding year, whereof he was unpaid; at least he would have inserted a provision, that it should be but prejudice to him to seek preceding years, which undoubtedly he would have done if any had been resting. And craved the pursuers' and their cedent's oaths of calumny, if they had just reason to deny that the preceding years were paid. And to the second allegeance, oppone their former answer.

DUPLIED,—That they oppone the common axiom, that it must at least be a discharge of three consecutive years that can infer in law a liberation from all preceding: but however they declare, they insist *primo loco* since the year 1646.

The Lords repelled the second allegeance about the annualrent since the decreet of buying, in respect of the answer made thereto; and found the defenders liable for the valued bolls and silver duty ever since 1647, and in time coming, ay and while the price be paid.

Farther ALLEGED for Alexander and Patrick Cockburnes, who have a right of wadset in the said lands,—That they cannot be liable but since the years of their possession, which began in July 1653; because the foresaid teind or valued duty is not *debitum fundi*, but the possessors are only liable for the same.

Which allegeances the Lords found relevant; and therefore found the said Alexander and Patrick Cockburnes only liable for the foresaid valued teind duty, and silver duty, the crop and year of God 1653, and since syne.

Advocates' MS. folio 61.

1668. *July* 24. ALEXANDER RITCHIE *against* GEORGE WAUCHOP of Gleghornie.

ALEX. RITCHIE, son, and heir served and retoured, to umquhile Mr. James Ritchie, his father, pursues for poinding of the ground of the lands of Cleghornie, upon an heritable bond, containing the sum of 12,000 merks, and infeftment taken thereupon.

Against which, it was ALLEGED,—That no process ought to be granted upon the heritable bond, till the pursuer deliver and procure to the defender a disposition from Doctor Jo. Levingstone to the teinds of Gleghornie, conform to a minute of contract past betwixt the pursuer's father and the defender, and which was partly the onerous cause for which the said bond and infeftment was granted.

ANSWERED and REPLIED,—The foresaid allegeance was not relevant *hoc loco*, but the defender must pursue the minor and his tutors; who cannot be holden to fulfill that part of the foresaid minute, anent the said teinds of Cleghornie, until decreet be recovered against them therefore: especially considering that the price allowed for the said teinds is a very small part of this principal sum of 12,000 merks, specified in this heritable bond, and which haill sum lies in the defender's hands; and therefore he cannot, upon that pretence, stop now the pursuer, who only craves poinding of the ground for his annualrents.

The Lords repelled the allegeance, in respect of the answer and reply made thereto, and therefore decerned.

Vide *infra*, *Jan.* 1676, No. 456; [thir same parties.]

Advocates' MS. folio 62.

1669. *February* 11. JANET SHAW *against* MARGARET CALDERWOOD, relict of George Shaw.

IN the action of reduction, pursued by Janet Shaw, heir served and retoured to Charles Shaw, who was son and heir served and retoured to umquhile George Shaw, against Margaret Calderwood, relict of the said George Shaw, to exhibit a disposition of the liferent of certain tenements of lands lying in Leith Wynd, made to her by the said George, to be reduced, 1*mo*, because all dispositions made by persons on death-bed, and after they have contracted a mortal disease, and whereof they never recovered but die, in favours of any, in prejudice of the immediate

heir or heirs by progress, are reduceable at the instance of the said heir or heirs; and if the said immediate heir be minor the time of his decease, and has not in his lifetime reduced the said disposition, the benefit of the said action of reduction is likewise competent to the heir of the said deceased heir. But so it is, the disposition made by umquhile George Shaw to this defender was such, viz. *in lecto*, in so far as he never came out after the subscribing of it, but had contracted the disease of before; and though it bear to be dated on the 1st December 1663, yet it was only subscribed in April 1664: and this disposition, as it was in prejudice of Charles Shaw, heir to the disponer, so it is to the detriment of this pursuer, who is infeft as heir to the said Charles, and consequently as heir by progress to George the granter; and which Charles having died before his majority, she must have the benefit of this reduction. *2do*, The decreet of registration of the said disposition obtained by the said defender must also fall, in consequence, with the said disposition.

It was first ALLEGED they could not debate on the reasons, because the production was not fully satisfied; in so far as the charter craved to be produced was not produced.

REPLIED, There was no necessity for producing the charter, seeing they declared they held the production as satisfied by the disposition and decreet of registration produced; and protested, if the said disposition should be reduced, that the charter proceeding thereon might fall in consequence.

The defender's procurators protested in the contrary. Then ALLEGED, The pursuer has no ground nor interest to quarrel this disposition, because she is not *hæres* immediate apparent to the granter; there having been two of the disponer's sons living then: and they having thereafter *ex post facto* deceased, she cannot upon this supervenient right quarrel the said disposition now.

(*Vide infra*, Number 369, in *July* 1672, *Gray and Scott* contra *Gray*; where the like case is.)

REPLIED, Though she was not *hæres* immediate, yet she was mediate heir; and there is *par ratio* for the one as well as the other to quarrel their predecessor's deeds; especially where the immediate heir dies minor, and the pursuer is now come in his place and has good interest.

Then further ALLEGED, always adhering to their former allegeance, That the said disposition could not be reduced, because the granter went to kirk and market after the same. *2do*, *Esto* It were *in lecto*, yet it was sufficient as to this defender, in order to her provision of liferent: and the yearly rent disponed being so very inconsiderable, only 200 merks a-year, and she being no otherwise provided by her husband, as he might any time of before, so also even in death-bed, have granted it; and in no sense or law ought it to be quarrelled, she being no otherwise provided. *

REPLIED for the 1st,—It is offered to be proven, *per testes instrumentarios*, that it was not subscribed till April 1664, and therefore they are forced to allege kirk and market since that time, and not since the time of its supposed date in December, 1663: and they offer to improve the same *in data*, and consign, if the defender will abide at it. As to the 2d, though the husband might in his *liege poustie*

* Craig thinks a man may give his wife a jointure *in lecto*, because it is no *perpetua alienatio*, page 85; but Durie observes the contrary found by the Lords at the 1st *of February*, 1622, *Robertson*.

have burdened his heir, or disponed and provided any part of his estate, in favours of his wife for her liferent use, yet it not being done *debito modo et tempore*, it ought not to be respected.

The Lords found the mediate heir had interest; and sustained the antedating relevant to be proven. And witnesses having been adduced thereon, and the same advised, the Lords found the same false in the date.

Then the pursuer's procurators ALLEGED, The same being false in the date, was false in all, and therefore craved it be wholly reduced. The Lords declared they would hear both parties' procurators thereon.

Then the pursuer produced two practicques out of Dury, the one on the *29th of March*, 1626, between *Keith* and *Robertson*, and the other at the *10th of February*, 1636, between *Edmiston* and *Syme*. Likeas the defender's procurators contended, it ought not to be null *in totum*; and produced a practicque out of the same Dury at the *4th December*, *Winraham* contra the *relict of Mr. Robert Winrahame*. See them all in Dury.

The Lords having considered them, FOUND the disposition false in the date, and therefore reduce and improve *in totum* the said disposition; and repone and restore the pursuer *in integrum* against the same, as if it had never been *in rerum natura*: reserving always to the said defender any right of terce, or other right she may have to the said lands, *prout de jure*.

Sinclar and Lermonth were for the pursuers, and Lockhart for the defender.

Vide infra, Number 375, in *November* 1672, between *George Home* and one *Brown*.

Vide infra, *November*, 1678, *Oliphant* and *Lady Grange*, Number 431.

It may be questioned What, if they had offered to prove that even after the true date that ought to have been inserted, he went to kirk and market, and so by the change of the date the pursuers had no prejudice; seeing it would have debarred them from quarrelling it, though it had been of that one date which they contend for? They say the Lords found such a falsehood so punishable, that the writ should make no faith at all, though there were no other ground whereby the same could lawfully be impugned. And this seems just. See *Craig de Feudis*, page 156. *Advocates' MS. folio* 62.

1669. *January* 20, and *February* 9. The BISHOP of GALLOWAY, the BAILIE of ARRAN, the DUKE of HAMILTON, and his Donatar, *against* DAVID FRENCH, and the TENANTS of MILNEBURNE.

January 20.—In this case, it came to be debated, if a charge given to the superior to enter a vassal who had comprised, did prejudge him of his casualties of ward and non-entries, which befell him thereafter, by the vassal's decease from whom the lands were comprised. The Lords, in P. D. found such a charge not equivalent to an infeftment, which denudes the prior vassal, and stops ward; and that the superior thereby is not prejudged of these casualties; which was never

heretofore decided; and the Lords declared they would keep this decision in all time coming.

Yet I think the Lords would yet decide otherwise, if, on such a charge, all diligence allowable in law were done, viz. to charge his superior to enter a compriser, and so from hand to hand *donec ventum ad regem, qui neminem recusat*; and to raise summons against the disobeying superior, to hear and see him decerned to tyne his superiority, &c.

Act. Lockhart. *Alt.* Cunyghame.

Advocates' MS. folio 60.

February 9.—*Decreet pronounced Dec.* 1668.—David French, as having comprised the estate of umquhil Robert Hamilton of Milnburne, *in anno* 1667, and thereupon charged the Duke and Dutchess of Hamilton, superiors of the said lands, to infeft and sease him therein,—intents a summons for mails and duties against the tenants of Milneburne. At the calling of the action compears Mr. William Hamilton, advocate, and craves to be admitted for my Lord Belheaven, and his cautioners, who stand infeft in a part of the lands of Milnburne, ay and while the payment to them of the sum of 10,000 merks. He declared likewise that he compears for John Hamilton, bailie of Arran, and craved that he might be preferred to the lands wherein he stood infeft. In like manner compeared Sir George Lockhart, Mr. John Cuninghame, and Mr. John Harper, advocates, as procurators for the Duke and Dutchess of Hamilton, as superiors of the said lands, and for Mr. Robert Black of Silvertounhill, the donatar to the ward and non-entries of the said lands; and for clearing of the dispute underwritten, they produced the charge of horning given at the instance of the said David French, pursuer, together with an instrument upon the back of the same, bearing the said Duke to have offered to have obeyed the charge, upon such satisfaction of composition as is usual in such cases, if not, protested that any useless procedure therein might be void and null.

All which being at length well considered by the said Lords, they have preferred the said Lord Belheaven and his cautioners, and also the said bailie of Arran to the pursuer, and to the duke and his donatar for the mails and duties of the lands wherein they stand infeft, and that for all years preceding the decease of the said Robert Hamilton of Milnburne; reserving them to debate with the donatar in reference to the mails of the lands foresaid, for all years since the said Milneburne's decease, and in time coming. And also prefer the said Duke and his donatar to the mails of the lands not contained in the said Lord Belheaven and his cautioners and the bailie of Arran their infeftments; and that for all years since Milneburne's decease, and in time coming during the ward; reserving always to the pursuer the right of his apprising after the expiring of the ward. Because the time of the dispute in the said matter, all parties having compeared by their respective procurators above written; and having produced their several interests above mentioned, the said Lords (of consent of the pursuers procurators, and of the said Sir George Lockhart, Mr. John Harper, and Mr. John Cuninghame,) preferred the said Lord Belheaven and his cautioners, and thereafter the said John Hamilton, bailie of Arran, *quoad* the mails and duties of the lands whereunto they have right for all years preceding the decease of the said Robert Hamilton: reserving to them to debate with the donatar for years subsequent, as is above mentioned.

Likeas thereafter, the said Sir George Mackenzie and Mr. William Weir ALLEGED that the pursuer ought to be preferred to the duke and dutchess of Hamilton and the said donatar: in regard he having apprised Milneburne's hail estate, and having charged the superior before Milneburne's decease, this charge did so denude Milneburne, the immediate vassal, that no casualty of ward by his decease could fall to the superior; and, therefore, by consequence, he must be preferred to the donatar.

To the which it was ANSWERED by the donatar's procurators,—That the reason of preference ought to be repelled, because, albeit a compriser by charging the superior to infeft him, will by the said charge, be preferred to another appriser who hath not done the like diligence, yet the charge doth not so operate as to make the compriser the superior's immediate vassal; in regard, the compriser could not be liable in payment of the feu-duties to the superior, except he had meddled with the mails and duties of the lands, and that he had completed his right by infeftment.

To the which it was REPLIED by the pursuer's procurators, that the answer ought to be repelled, because the charge, by our law and constant practique observed in such cases, forceth the superior to enter the compriser, and denudeth the vassal from whom the lands are apprised; so that the first charge doth not only give the appriser preference to another compriser, but also denudeth the debtor, so as he is no more vassal; and not being vassal, no casualty can fall in the superior's hands by reason of his decease or rebellion; in which last case, the Lords have been still in use to prefer a compriser who has charged the superior to a donatar of the liferent escheat of the debtor, whose escheat fell after the charge. And whereas, it is answered, that the charge is not sufficient to make the appriser vassal except likeways infeftment had followed; it was replied, that the same ought to be repelled, because by the charge, the pursuer was so constituted vassal, that by his decease the ward had fallen in the superior's hands, seeing the ward falls by the decease of one who is in fee, (See Balmanno, *Lockhart of Bar* against *Tenants of Monzie;)* in which condition this pursuer (after the charge) must be reputed, considering that thereupon he would have gotten removing and decreet for mails and duties against the tenants, though not infeft.

Whereunto it was DUPLIED by the said Sir George Lockhart, Mr. John Cuninghame, and Mr. John Harper, procurators for the donatar—That 1*mo*, they opponed their former answer, viz. that the charge against the superior is only introduced to prefer the first compriser to another posterior charger, but it doth not denude the debtor; so that he is no more vassal, and that the pursuer could never be liable in payment of the feu-duty, except he had been infeft. But 2*do*, this charge could never militate against the superior to prejudge him of his casualty and benefit of ward, except it could be made appear that the superior had been *in mora;* which cannot be alleged in this case, because the superior was willing to have obeyed the pursuer's charge, upon his payment and satisfaction of what was due to him as superior; and thereupon took instruments, and protested that any procedure upon the apprising might be ineffectual; and for proving thereof, produced the instrument above written; so that the pursuer not having at that time offered a charter to the superior, with an year's interest, according to the act of Parliament, no charge against the superior could so operate as to prejudge him of any casualty, or benefit that might accresce to him by the decease of his vassal. And as to that part of the

reply, taking the case to be the same with the vassal's rebellion, wherein the compriser would be preferred; it was duplied, that there was *dispar ratio* betwixt a casualty falling by the reddendo of a charter, viz. service of ward, and that which falls by the delinquency of the vassal; in which last case the Lords are in use to prefer the compriser to the donatar of the liferent escheat, because *medio tempore*, the vassal might have suffered himself to be put to the horn, of purpose, that his escheat might fall in the superior's hands to the prejudice of the compriser, his creditor, which cannot be alleged in this case of a ward; and therefore, &c.

To the which it was TRIPLIED by the pursuers' procurators above written, —That the act of Parliament has allowed a charge against the superior to be a sufficient diligence for the creditor to obtain his just debt; wherein the advantage of the superior is not at all considered, likeas the appriser is not obliged for any farther diligence than allenarly to charge, seeing thereupon he may have the benefit of any action: so that the law having introduced no more, the compriser, by his charge, is a full proprietor, and who must be preferred to the donatar; because a prior compriser, though infeft after the charge given by the posterior appriser, will be preferred to the donator because infeft; and the posterior appriser, upon his prior charge, being preferred to him who was first infeft, must by consequence be likewise preferred to the donatar, this charge being equivalent to an infeftment: so that thereby the debtor being totally denuded, there can no casualty fall to the superior by his decease, he being no more vassal; for if he were a vassal, the compriser also, by this charge, being a vassal, the superior should at one and the self same time have two vassals, which were most absurd. And seeing the pursuer is, beyond all question, vassal, and so would incur all the disadvantages arising thereupon, as the falling of the escheat in the superior's hands, in case of rebellion, and the lands falling ward and in nonentry by his decease, so also he ought to have all advantages that may attend his being vassal. And as to that part of the duply, bearing it to have been the pursuer's own fault that he was not entered, and that the superior was not *in mora;* it was triplied, that it was not the custom that comprisers went along with messengers, when they charged superiors, and offered the year's rent with a charter; so that the superior was *in mora* notwithstanding of his pretended willingness to have obeyed the charge, because he ought to have suspended the same, and at the discussing, the compriser would have been admitted to pay an year's duty. So that the not offering the same at the time of the giving of the charge cannot prejudge him of the benefit of his diligence: especially considering that there is a mutual obligement in law betwixt the superior and the compriser; *viz.* the superior is obliged to enter the vassal, and he to pay an year's duty; so that, from the date of the charge, the compriser turneth vassal, and the not payment of the year's duty taketh not away the obligation, but allenarly delayeth it; for if the superior had suspended upon that reason, that an year's duty had not been paid upon the discussing of the suspension, the pursuer's right would have been drawn back to the date of his charge. Likeas the compriser is not tied by act of Parliament to go along with the messenger, the time of the giving of the charge; so that it were most unreasonable to disappoint him of his diligence upon that account, because being a singular successor, he is not holden to know the reddendo of the debtor's charter, nor know the true extent of the year's duty, and so he may bring less or more, which were alike as if he came not at all. NOTE, Likewise an year's rent of the lands apprised, might much exceed the sums for which the

same are apprised; in which case, it were most unjust to exact the haill rent for the sums contained in the apprising: as also if there were a tie upon the compriser, to offer and pay *ut supra*, it were of most dangerous consequence, because the debtor might prefer one appriser to another, by showing his writs to one for drawing of a charter, and concealing the same to another, who might have been prior in diligence. And therefore the pursuer having done all that in law or reason he was obliged to do, and being yet willing to pay such a composition as the Lords shall find equitable, he ought to be preferred.

The which reason of preference, answer, reply, duply and triply, being considered by the said Lords, they repelled the foresaid reason of preference proponed for the pursuer, and his reply and triply, in respect of the foresaid answer and duply; and found that the Duke and Dutchess of Hamilton, as superiors of the lands above written, and the donatar, had right to the ward thereof by the decease of the said Robert Hamilton, notwithstanding of the pursuer's apprising and charge proceeding thereupon before the death of the vassal; and found that it is the duty of the compriser to offer a charter, and an year's duty of the lands to the superior, and if the duty offered be less than an year's duty of the lands, that the compriser is to find caution for the overplus; and found by the instrument produced upon the back of the charge, that the superior was not *in mora*. And therefore the said Lords preferred the said Duke and Dutchess of Hamilton, and their said donatar, to the pursuer, since the decease of the vassal, and in time coming during the ward; reserving to him his right after the expiring of the ward, as is above mentioned, and ordain letters in form as effeirs.

This was thought a very hard decision, and the like of it cannot be shown before. See farther my thoughts, in the summary of this same decision, *supra* [page 450,] *20th January* 1669, *Duke Hamilton and French*. *Vide 23d March* 1622, *Mr. Simeon Ramsay*, and the cases there. *Vide infra No.* 652, *13th November* 1677, *Sir William Purves* against *Strauchan of Kinaldy*.

Advocates' MS. No. 1, *folio* 65.

1669. *February*. MURRAY *against* LYLLE.

THE suspension, Lylle *contra* Murray, being called before my Lord Stair, in December, 1668, Mr. Alexander Oswald, procurator for the suspender, repeated the first reason of suspension: also offered him to prove that the ship was broken *vi majore*, and that no *mora vel culpa* on his side proceeded the *vis major*; and so was made incapable to ply the said voyage. (See P. Peckius *ad Leges Nauticas, pagin.* 285, *et seq.*)

To the which it was ANSWERED for the charger, by Mr. John Colvill and myself,—That albeit the ship had been broken *vi majore*, which he denied; yet the foresaid reason ought to be repelled, in respect of the contract charged upon; whereby the suspender did input the charger, master of the said ship, and took him obliged to attend the same, and to cause repair the same in all the defects thereof upon the said suspender his charges, also to hire a company of skilful mariners for plying the said voyage. And it is offered to be proven that the charg-

er did attend the said vessel for the space of eight weeks, and did hire sailors, and was ready to fulfil all the other parts of the said contract; likeas by the instrument produced, he made offer to do the same.

Which reason and answer the said Lord having considered, he ordained before answer the suspender to prove the ship was broken *vi majore*, and at what time; and also ordained the charger to prove his attendance and hiring of mariners; *item*, assigned the day of January. Whereupon an act being made, letters of diligence by both parties are raised thereon: who compearing and deponing, the Lords at the advising of the cause and of the deposition of the witnesses, found the letters orderly proceeded for the sum of L.13 Sterling, and suspended them for the remanent sums charged for.—*28th February*, 1669.

Lauder, *Clerk*. *Advocates' MS. No.* 3, *folio* 69.

1669. *July*. JAMES CLEILLAND and JAMES SCOT *against* MR. JOHN BONAR.

THIS action being called in July, 1669, it was ALLEGED for Bonar, defender, by Cunyghame, Harper, Stewart, and myself, his procurators, that no process can be sustained against him, because one of the assignees, viz. Edward Cleilland, is deceased, and his testament is not yet confirmed; and so, no active title to pursue the defender on. *Vide infra*, 12th January, 1678, *Dundas* against *Holborn*.

ANSWER, Maxwell and Mr. Archibald Campbell, procurators for the pursuers, —That the allegeance above written ought to be repelled, in respect there are two others of the assignees living, at whose instance, as well as of this Edward Cleilland, this action is intented and pursued, viz. James Scot and Ja. Cleilland, son to the said Edward; and craved process at their instance, as assignees yet on life.

Which allegeance above written, and answer thereto, the Lords having considered, they declared before answer thereto, that they would hear both parties farther. And their foresaid action being again called, the pursuer's procurators declared they would restrict their pursuit *pro loco*, and insist *primo* for the two parts of the debt above written, due and payable to the two pursuers living.

Whereto it was ANSWERED for the defender, that no respect can be had to the pretended ticket produced for them, because the same is only a declaration, and noways obligatory, and so can furnish no action in law against him.*

Whereunto it was REPLIED for the pursuer, that in fortification of the ticket above written, produced by them, they offered them to prove that either the defender got money to pay the quarters contained in the said ticket, and did not pay the same; or otherwise was quartered upon some other person, and not on Margaret Wardrop the pursuer's cedent; and so the defender must be liable in payment of the quarterings above written.

Which reply the Lords, having considered, in regard of the long time that has intervened since the said quartering, by their interlocutor, found the said reply relevant to be proven by the said Mr. John Bonar defender, his oath of verity

* *Nota*, the act of indemnity in 1662, seems also to include and take away this debt.

simpliciter, and assigned the day of to his procurators to produce him, with certification, &c. who protested for a qualified oath, and the pursuer's procurators in the contrary. At the which term the defender compearing, he deponed *negativè*, that he got no money from the States to pay the foresaid quarters, and that he had no other quarters but with the said Margaret, and that he never promised her payment thereof; but thinks if he had gotten money to pay, that he was in duty obliged to have done it; and that he never knew any of the officers there at that time pay any money to them on whom they were quartered, for their quarters, &c.

Which oath and deposition the Lords having advised, they found thereby the said Mr. John Bonar was no way liable, nor subject in payment of the said sum acclaimed by the pursuers from him, as being noways their debtor nor their cedent's; and therefore *simpliciter* assoilyie him from the haill points of the summons, &c. and decern and declare him free and quite from the payment of the sum acclaimed, in all time coming.

Advocates' MS. No. 4, folio 69.

1669. *December.* LAUDER *against* DAVID WATSON and OTHERS.

IN the action of exhibition raised by my Father against Mr. David Watson, (which was called in December 1669 before my Lord Stair,) whereby was craved, that the defender might be decerned to exhibit the decreet of apprising led at the instance of the E. of Ethil against the Lord Ramsay, with the blank translation thereof, and other writs relative thereto; to the effect they might lay in the process of reduction and improbation intended by my father against the same, *till* the final conclusion thereof: the pursuer's interest, whereby he called for the said writs, was libelled to be as a lawful creditor to my Lord Ramsay, and as having apprised his lands and intented improbation of the writs desired to be exhibited.

My Lord Stair would not sustain the interest, because it was a thing altogether unheard of, to call for exhibition of writs for any other effect except either it were for inspection *ad deliberandum* at the apparent heir's instance, or for delivery at the owner's. *Item*, If exhibitions of this nature were sustained, then should none ever wait upon the ordinary terms of improbation their running, but would raise exhibition against the havers, which is against form. *3tio*, No man can call for exhibition of writs except they be such as are conceived in his favours; and noways for writs that are in his prejudice, as is here. And hence my Lord Stair by his interlocutor, found, That if we would mend our libel thus, that we called for exhibition of that apprising, as led and deduced to the use and behoof of the Lord Ramsay, the common debtor, and which so behoved to accresce to the pursuer, who had comprised not only the right that then stood in the person of the Lord Ramsay, but also all supervenient rights whatsoever (as this apprising was,) that might become in his person; that then he would sustain the libel.

Item, Found that it would be more proper to crave such an exhibition by a bill to the Lords *in præsentia* than by an ordinary action. Though it may be reasoned, that having refused the desire of the exhibition, being pursued by way of an

ordinary action, *multo magis* ought it to be refused by way of a bill, which is most summary. Yet the reason of the difference I suppose lies here, that in the matter of bills the Lords exerce much of their *officium nobile*, by which they may certainly command the defender to exhibit these writs to the clerk of the improbation, there to lay, &c. whereas in ordinary actions they are astricted to the ordinary forms which they may not transgress.

Advocates' MS. No. 5, folio 70.

1669. *December 24.* SEMPLE *against* WALKER.

IN the action of suspension, Semple *against* Walker, called about that same time, my Lord Stair turned a decreet of the Sheriff of Lanerk into a libel, because it bore only that the defender being twice lawfully summoned to give his oath upon the libel compeared not, and so was holden *pro confesso;* and did not bear that he was personally apprehended: whereupon we were necessitated to refer the same of new again to the suspender's oath. Whereas it might have been alleged, that this decreet ought as well to be sustained as they sustain a horning bearing delivery of a copy to the party, though it bear not that he was personally apprehended.

Vide *infra November* 1676, *Findlay, No.* 504. *Dury, 22d July* 1626, *Stewart* against *Ahanay.*

Advocates' MS. No. 6, folio 70.

1670. *February.* GEORGE MOSMAN *against* ADAM and ANDREW BELLS of Belford.

IN the suspension Adam and Andrew Bells of Belford *against* George Mosman, this reason of suspension was repelled, that the charger's right being a right flowing by translation from Elizabeth Cunyghame, who had an assignation to the bond charged upon, her assignation was never intimated to the suspenders in the cedent's lifetime, and so could not produce summary action by a charge; but ought to have been pursued upon, *via ordinaria*, in regard that the assignation was intimated to James Bell, (who was principal debtor in the bond,) before the cedent's decease, which was found a sufficient intimation likewise to the cautioners. Vide *Dury, 23d January*, 1624, *Stevenson and the Laird of Craigmillar.* Vide *Cujacium, Codice, De duobus reis.* See *28th November*, 1678, *Reid and Bruce of Newton.*

The second reason of suspension was found relevant, viz. that the suspenders were not *in tuto* to make payment of the sum to the charger, because the charger's author's right was questioned, and under reduction at the instance of Quintene Findlay and his wife, as nearest of kin to John Lithgow, granter of the assignation: the reason of reduction was death-bed.

Whereto it was REPLIED,—That this bond of Belford's was a bond which might lawfully be assigned on death-bed, because, in the body of it, it bears a dispensa-

tion and a power to him to assign, dispone, and transfer the said bond, *etiam in articulo mortis*, to whom he pleased: and so this dispensation must save the said assignation from reducing *ex capite lecti*.

Upon this reply, my Lord Halkerton was content to give both parties the Lords' answer. Who having very ripely canvassed the same, found it a point of great importance and weight, and demurred exceedingly thereon; and being the last week of the winter Session, they superseded to give their judgment thereon while the 1st of June. And truly it was so: for, on the one side, it would seem that the said dispensation should sustain the said assignation, though made on death-bed, because it is an act *inter vivos*, and it is uncontraverted but a man may dispone upon his heritage and heritable bonds for implement and performance of acts or obligements contracted by him in his *liege poustie; exempli gratia*, for payments of debts contracted before. *Hope, titulo De Testamentis et Codicillis.* Yet, on the other hand, it seems very hard that such a dispensation should be enough to empower a man to dispone upon his heritage *in lecto ægritudinis*, the cause of which prohibition is most rational and most excellent, viz. because the most part of men *in confinio mortis constituti* are not *sanæ mentis*, and not in that integrity of mind as is sufficient for a man who would dispose upon so important rights: likewise the law has wisely considered how much a man, at such a time, lies exposed to the solicitations and importunities of friends or flatterers in whom he has no interest, and how easily a man, in that case, may be wrought upon to give away his means to the prejudice of his righteous heir. So then, this being the reason of that noble custom, no dispensation or reservation which a man makes in his *liege poustie* should be sufficient to give him a power to dispose upon heritage in death-bed; unless he had likewise a dispensation and assurance from God Almighty, that when he should come to die, he should have his wits fresh, vigorous, and rational, as may be required in a man who is to dispose upon his heritage; which assurance none can have.* *Item*, If such dispensations were sustained, the whole country would make use of the same; and so that useful custom would be rendered useless, where our law repetes dispositions of heritage upon death-bed. (*Vide infra, No.* 227.) *Item*, The Lords have been loath to determine whether or no the King, under his Great Seal, can dispense with the said law, and give a man power *ea non obstante* to test upon heritage; if which be dubitable, much more must it be so whether every private person may reserve that power to himself, by an act *inter vivos*.

Advocates' MS. No. 7, folio 70.

1670. *February.* Sir John Whytfoord of Milnetoun, *against* James, Bishop of Galloway, and Claud Hamilton of Parkhead.

Sir John Whytfoord of Milnetoun, pursueth James Bishop of Galloway, and Claud Hamilton of Parkhead, his brother, upon all the passive titles, as represent-

* *Vide omnino Zacchiam, Q. M. Legalium, lib. 2. tit. 1. Quæst. 19, per totum. Vide infra, 26th June,* 1677, Birnies *against* Morray, No. 580, § 2; *item, November,* 1677, Gray of Wariston and James Cunyghame, about Doctor Cunyghame's estate.

ing their father, Sir James Hamilton of Broomhill, for a debt owing to his father (to whom he is served and retoured heir,) by the said Sir James. The said two defenders having received dispositions from their father of some lands, after the contracting of the debt now pursued upon; my opinion was asked, Whether or no accepting of the said dispositions would be sufficient to make any of them *successor titulo lucrativo post contractum debitum*? I answered not, for two reasons, the first was, that I was well informed that any lands either of them had by disposition from their father, was with very great burden of his debts, and so they could never be reputed to have got them *ex causa lucrativa*. But the second was an answer *in jure*, and unanswerable, *viz.* that they were not persons that could be convened as successors by a lucrative title after contracting of the debt, which passive title only adequately quadrates to those who are *alioqui successuri* to the disponers, such as neither of thir defenders were; they having an elder brother, *viz.* my Lord Belhaven, who could only be heir, and succeed as heir to their father; for this passive title can in reason be no farther extended against a man than if he were really entered heir, and therefore cannot militate against him that is not heir to the disponer: *nam absurdum esset fictionem plus operari posse in casu ficto quam operatur veritas in casu vero.* Yet the Lords have sustained this passive title against the eldest son of the apparent heir, receiving disposition of lands after the debt from his goodsire, though he be not *persona immediate successura;* and that because, by the course of law, he is *alioqui successurus necessarie*, though not *immediate*. It is likewise required, that the person who is liable to this passive title, be apparent heir, and *alioqui successurus necessarie;* and not immediate apparent heir *probabiliter tantum et pro tempore:* as a disposition by one brother, having no children at the time, to another brother, (who so is his apparent heir,) will not infer this title, because the brother is not *alioqui successurus necessarie* by the course of law, *quamdiu liberi sunt in spe.* (*Vide infra, February*, 1674, *No.* 444.) And therefore I thought that the foresaid defenders could not be overtaken on that head, but that the pursuer's best course would be to pursue *actione rescissoria Pauliana, Eorum quae in fraudem creditorum;* or reduce upon the 18th act of Parliament *in anno* 1621, ordaining all dispositions posterior to the debts of lawful creditors, and made to conjunct and confident persons, without a just or onerous cause, or any true and competent price paid therefore, to be reduceable and annullable at the instance of any anterior creditor.

This cause being called, and the pursuer insisting against the defenders aforesaid as vitious intromitters, I REPLIED, Ought to be repelled, for Parkheid, because I offer me to prove executor creditor confirmed, before the intenting of your cause.

Whereunto it being DUPLIED upon superintromission, I TRIPLIED that the said superintromission (unless the pursuer would say it was fraudulent, and before the confirmation,) cannot be received here by way of exception, but requires a new process, or a dative *ad omissa*, which the pursuer may take. *Vide* Dury, 28th March, 1632, *Maxwell.*

Notwithstanding, the Lords found the duply upon superintromission relevant, and assigned him a day for proving thereof, and that same day to me to prove executor creditor.

As for the Bishop of Galloway, I ALLEGED, that there being an executor confirmed, viz. Parkheid, *esto* he had vitiously intromitted, that was enough to

purge the same, and make him allenarly countable to the executor. Which was found relevant by the Lords.

Advocates' MS. No. 8, folio 71.

1670. *February.* SIR THOMAS STUART of Gairntullie *against* SIR WILLIAM STUART.

IN an action betwixt Sir Thomas Stuart of Gairntullie and his brother Sir William, an assignation produced by Sir William, granted to him by his sister, to a bond for 20,000 merks, granted to her for a portion by her father, being quarrelled by Sir Thomas *, because he offered him to prove *per testes omni exceptione majores*, that their sister, at the time of the making that assignation, a good space before, as also after the same, was furious and mad, and so, during that time, could do no deed that can be valid, or can subsist in law.

Whereunto it was REPLIED, That he offered him to prove that though she took whiles fits of distraction, yet that she had *dilucida intervalla*, and that it was in one of these that she granted the said assignation; and so the same, as done *a sana*, must be sustained.

The Lords ordained them to adduce witnesses *hinc inde*; Sir Thomas for proving the furiosity before and after the assignation, and Sir William for proving the *dilucida intervalla*: Whereupon, witnesses having been led by either side, and the Lords being about to advise the depositions, they desired to hear both parties' procurators; whereupon Sir George Lockhart, being for Thomas, did seriously recommend to the Lords their consideration what truly *dilucidum intervallum* was; and that every remission of that height of madness called by the physicians *rabies furoris* will not amount to make a dilucid interval, but that it must be a full intermission and clear cessation of the fury, and of all the degrees and steps of it; and therefore he confessed that by the depositions of the witnesses adduced by Sir William, it might possibly be proven, that at sometimes she was more calm and quiet, and not so agitated and tossed with the vehemency of the madness as at others: but he humbly conceived that that noways could infer a dilucid interval, which imports a firmness, gravity, and consistency of spirit, to validate an act of such importance as this assignation was, and which was no ways observable in her; and for this his opinion he cited Zacchias his *Quaest. Medico-leg. lib. 2. tit. 1. quaest. 21. versus finem.*

Sir George Mackeinzie, being for Sir William, regretted first that Sir Thomas should have been so cruelly unnatural as to have been the publisher of a pitiful infirmity his poor sister had been detained with, whereas the bonds of blood and nature should have made him conceal it rather, and extenuate it. Next he complained, that that ancient and excellent practice in our country of trying of idio-

* By a prior solemn decision the Lords had found, though in this bond Sir Thomas was substitute to her, yet she remained still in the fee, and might assign the same, as she had done, notwithstanding the said substitution. The information see beside me. Vide infra No. 48. [*23d February*, 1671,—against *Viscount of Oxenfurd*;] where there is something contrary.

try or furiosity by an assise of thirteen sworn men, was now wholly despised and neglected, and no more used. Yet Sir George might have remembered that it has now been long obsolete, as *Dury* observes, 21*st February* 1632, *Alexander* against *Kinneir*. *Advocates' MS. No.* 9, *folio* 71.

1670. *February.* HEIRS of the LAIRD of CRAWFORDSTON *against* BROWN of Ingliston, and his Children.

ELEISTON his lady, Barnecleuch his lady, and the other two sisters, pursue, as apparent heirs of line to the deceased Laird of Crawfurdston, their father, an exhibition of the charter chest, writs, and evidents of the lands, against Brown of Ingliston, and his children, whose mother was one of Crawfurdston's daughters; as also of some dispositions made in his and his children's favours by the Laird in his lifetime, of the said estate: likeas to hear and see it found and declared that the said dispositions, bonds, and others, must be reputed and holden to be yet in the defunct's charter kist, and so never delivered evidents in the defunct's lifetime, and so to belong to none; but to be looked upon as if they had never been made, and to be no hindrance to thir pursuers as heirs of line to succeed to their father's whole estate, in so far as the same were lying in the defunct's charter kist undelivered at the time of his decease, and were meddled with by thir defenders, and taken out thereof in great haste immediately thereafter, and transported that night, with the other evidents of the lands, in codwares, to another place.

This being proven, the Lords, in respect of the said precipitate diligence and intromission, found the said dispositions, and others, noways to have been delivered evidents in the maker's lifetime, but that they must be reputed as if they were yet in the charter kist.

Then the defender excepted that, however the Lords might find him bound to exhibit the said dispositions, and others, to be cancelled or declared undelivered evidents, yet that he could not be obliged to exhibit the disposition of such a date to be declared an undelivered evident, because the same bears a clause dispensing with the not delivery thereof.

This being found relevant, the pursuers insisted to have their right, as heirs aforesaid, declared, to any lands belonging to their father which were not contained in that disposition, sustained by their Lordships. This the Lords admitted, and ordained them to condescend; which they did, and named the lands of Stewarton.

ALLEGED by the defender,—That these lands are expressly contained in his disposition.

It was ANSWERED,—It is true they are in the disposition, but that is only the superiority thereof that is disponed: for Crawfurdston at the time of the disposition had no other right thereto; and it is offered to be proven that he has, since the said disposition, acquired the heritable right and property thereof; and therefore the right thereof must pertain to thir pursuers.

The Lords repelled the allegeance, in respect of the answer or reply, and as-

signed a day for proving thereof. Likeas, the Lords found a bond granted by Crawfordston to this defender, of L.21,000, in all probability was only made in warrandice, and to secure the foresaid disposition made by the said Crawfurdston to the defender; and therefore restricted it that it should not affect neither the defunct's heirship nor executry, no not any lands save those contained in the said disposition, for the making of which effectual it was presumed to be granted allenarly. *Advocates' MS. No.* 10, *folio* 71.

1670. *April.* BURNET *against* BURNET.

THE tutor of Leyes pursuing the mother to the pupil, at the secret council, for exhibition and delivery of the person of the pupil to him as tutor of law, and so having the sole and undoubted right to keep and educate the pupil. (*Vide Parl.* 1661, *act* 8*th*, against *Papists* and *Jesuits, in fine. Vide act* 9, *Parl.* 1567:)

EXCEPTED,—The pupil cannot be delivered up to this supplicant, because he being a quaker, the child's education is not to be committed to him, in regard of the hazard there is therein of the pupil's perversion by his tutor's poisoned principles; and alleged the law of the kingdom in the case of Popish parents, appointing their children to be taken from them, and to be educated in godly company; now if children may be taken from parents, because of their religion, *multo magis* may they be taken from tutors, where the obligation is more remote, and the lines of the law of nature more dim.

REPLIED,—His being of a different religion can noways make him tine, or deprive him of that uncontroverted right and privilege due to him, as the nearest agnate, by the law of God, of nature, nations, and the inviolable practice of this kingdom: for if that were, how comes it that popish noblemen retain, even since the reformation, their privileges of sitting and voicing in Parliament, if they take the oaths of allegeance and supremacy; of presenting to churches whereof they are patrons, &c.; albeit, there may arise very great detriment and prejudice to both kirk and state by that latitude or such concessions; and yet it is sustained, because it being their natural right, there could not be law found whereby to deprive them thereof. As for the act of Parliament, it is of the nature of all others *viz. strictissimi juris,* and not to be extended *de casu in casum.* Yet to obviate the apparent hasard, he was content the pupil should be boarded at schools, in any place the mother and his other friends should agree upon; and so that he might be in the custody of neither of them.

Vide Fabrum in codice, lib. 1*mo, tit.* 5*to, De Legibus et Constitut. Principum.*

Advocates' MS. No. 11, *folio* 72.

1670. *June* 14. SIR ARCH. MURRAY of Blackbarronie *against* BARROWMAN.

SIR ARCHIBALD MURRAY of Blackbarronie pursueth reduction of a disposition, granted by the Laird of Cringelty to this defender, after an inhibition served against Cringelty; to which inhibition Blackbarronie has now right, *ex capite inhibitionis*. (*Vide* 28*th Feb.* 1679.)

ALLEGED for the defender,—That his disposition can never be reduced *ex capite inhibitionis;* because albeit the same be posterior to the inhibition, yet the ground and cause whereupon the disposition proceeded, *viz.* a decreet-arbitral betwixt the party inhibited and this defender, at the least, the submission whereon the said decreet followed, were prior to the inhibition; and so the disposition must be drawn back *ad suam causam et causam causæ, viz.* the submission, and will never fall under the compass of that inhibition.

To which it was ANSWERED,—1*mo*, They opponed their inhibition, which was prior to the very submission. But, 2*do*, *Non relevat* to say that the inhibition behoved to be before the submission; seeing it is certain that the inhibition will reach this disposition, if it was served any time before the decreet-arbitral, wherein there was a specific obligement on the party inhibited, to dispone these lands to the defender. And this must be reputed to be the same very case with that where a party inhibited grants disposition of his lands, or other infeftment proceeding only upon a bond merely personal, and bearing no obligement to dispone or infeft; in which case, such a disposition proceeding upon debts prior, will never sustain against an inhibition, and so neither must it in our case.

It was REPLIED,—That the inhibition was indeed served against Cringelty personally, before his entering into that submission with the defender; but that the said submission, (whereon followed the decreet-arbitral obliging Cringelty to dispone thir lands,) was entered into before that the said inhibition was executed at the head burgh of the shire where thir lands disponed lay, and so before that the lieges were *in male fide* to take rights, or others, from the party inhibited, of lands lying in *eo districtu vel territorio* where the inhibition was not as yet executed; nor before that, was the party inhibited put *in mala fide* to dispone such lands, or to enter into a submission anent his rights of them.

It was DUPLIED,—That albeit the inhibition was not as yet a complete and perfect right, yet the creditor, server of the inhibition, being *in cursu diligentiæ*, nothing can be done by the debtor in prejudice of his begun diligence: otherways all inhibitions in the world might be frustrated and eluded. For I put the case that a person is inhibited personally here, but his estate lies in Orkney: next day after, he dispones his land there; whereas it will take a considerable time ere it can be executed at the market cross of Kirkwall: will any man in reason say to me that such a disposition should defend against the said inhibition already executed against the debtor personally?

And my Lord Newbyth being Ordinary, inclined to sustain the duply. And himself called to mind, that the Lords tended much to find the like allegeance relevant in a case betwixt Mr. John Eleis and one Wishart. Only in that case, I am informed, there were great presumptions to make appear that the same was done in defraud only of the creditors' begun diligence by inhibition, and that the disposition

was to the disponer's own behoof. However he gave them the Lords' answer on it.

Act. Sinclar. *Alt.* Wallace.

Advocates' MS. No. 12, *folio* 72.

1670. *June* 14. HALIBURTON *against* F. SCOT, Keeper of the Minute Book.

THIS was a reduction of a right upon the act of Parliament 1621, as done *inter conjunctas personas*, without any true or onerous cause. My Lord Newbyth, (because of the act of sederunt appointing all reasons of reduction to be heard in the Inner House, unless there were a warrant to the Ordinary in the Outer House to hear them,) refused altogether to hear them on their reason, seeing there was no warrant lying in process; and this, although the defender was content to dispense with the want thereof, and was earnest to be heard *in causa*.

Advocates' MS. No. 13, *folio* 73.

1670. *June* 14. The TOWN of ANNAND *against* GRAHAME.

THIS was a pursuit for some customs granted by the Parliament in 1661, to this burgh, of all beasts driven through their privileges, either from Scotland or Ireland, to England.

ALLEGED,—Thir customs was not contained in their charters of erection, but was only given by an unprinted act of Parliament, which are ever impretate *periculo petentis*. My Lord Newbyth inclined to sustain such a custom, if the said town would prove they had been in possession thereof: though it was alleged that no possession, though of never so long a time, can validate an unlawful custom tending to oppression, as this does; and adduced the practique of *the Burgh of Lithgow and the Fleshers of Edinburgh*, out of Dury, 15*th November*, 1621. He was ordained, before answer, to produce his practiques he founded on.

Chalmers and Hog. *Advocates' MS. No.* 14, *folio* 73.

1670. *June* 15.

Referente Domino Gosfuird, the Lords found a declarator of bastardy needed not to be continued, *ob favorem fisci;* but the pursuer behoved to take a day to prove his summons, viz. that such a person, the gift of whose bastardy he craves may be declared, was gotten on a woman who was never married to the said person's father, and this by witnesses: Notwithstanding, it was alleged, that bastardy was a negative, and so could not be proven, but proved the self; 2*do*, That it was impossible to prove it now by witnesses, since the bastard was sixty

years old ere he died, and so no witnesses can be adduced for proving that point but such as must be past eighty.

Advocates' MS. between No. 15 *and* 16, *folio* 73.

1670. *June* 15. WOOD *against* REOCH.

THIS was a spuilyie for eliding whereof there being an exception (offers to prove lawfully poinded) proponed, the pursuer craved he might condescend, by virtue of what he had poinded; of a sentence or a bond. The defender answered, of a sentence recovered on a bond granted by this pursuer to the defender.

REPLIED,—The defender can never be heard to maintain his poinding, and defend himself from a spuilyie by that sentence and bond; because the pursuer offers him to prove that he has obtained reduction in *foro* of that bond, and all that has followed thereon *ex capite minoritatis et læsionis.*

DUPLIED,—The reply *nullo modo relevat* to make the defender a spulyier, unless he say he had obtained the said decreet of reduction before the poinding.

TRIPLIED,—That if his decreet be found posterior to the poinding, then he is content to restrict his summons to vitious intromission and restitution of the goods intromitted with by virtue of the said poinding. The Lords restrict the summons *ut supra.*

Vide Hope, tit. Spulyie, folio 172, *in calce.*

Act. Hog. *Alt.* Chalmers.

Advocates' MS. No. 16, *folio* 73.

1670. *June* 16. RIDDOCHS *against* SORLEY.

THIS was an action for making up the tenor of a disposition: ALLEGED this action cannot be sustained, because the said disposition being dated *in anno* 1626, there was nothing followed thereon while the intenting of this cause, which was not till 1667, and so the said writ was prescribed.

ANSWERED,—There was a summons of removing raised and executed within the forty years of prescription, which interrupted the same.

REPLIED,—That it is a rule of law *non prestat impedimentum quod de jure non sortitur effectum,* but so it is, that summons was elided by an unanswerable defence of twenty years' possession before the same, by virtue of a right standing unreduced, and therefore could produce no effect, not even as to the interruption of prescription.

The Lords found the said summons (though the same was taken away *ut supra)* was sufficient interruption.

And the *casus omissionis* being libelled to have been the time of the plague in 1645, the said condescendence was sustained, since *tempus pestis est tempus calamitosum et privilegiatum.*

Act. Bailzie. *Alt.* NORVELL. *Advocates' MS. No.* 17, *folio* 73.

1670. *June* 16. ANENT SEASINES.

FOUND, That *falsa designatio* of lands in a charter or seasine *non obest nec vitiat*, the said lands being otherways sufficiently demonstrated as by the heritor, superior, their bounding, the parish wherein they lie, &c. The error was that the seasine bore they lay within the Sheriffdom of Wigton, whereas they lay in Dumfries-shire. *Advocates' MS. No.* 18, *folio* 73.

1670. *June* 16. ANENT MINORS.

WHEN a minor or pupil is lawfully charged to enter heir, &c. their tutors or curators need not to be called, in regard it is not a fact prestable by them. *Advocates' MS. No.* 19, *folio* 73.

1670. *June* 17. The VASSALS of DUNYKEIR *against* the LAIRD.

JOHN WATSON of Dunykeir, or Pathhead, having set several parts of his lands in feu to sundry persons, with the servitude of casting feal and divot in a large adjacent moor, which belonged to him in property, in the said whole moor, or in any part thereof they pleased, for beiting and repairing of their houses, &c. Thereafter Watson feus out the said moor to others, in property, without mentioning the foresaid servitudes; at least grants new servitudes therein, by which the former feuars, his tenants, finding themselves enormly prejudged and lesed in their privilege of casting, &c. in the said moor, in respect the same was exhausted and surcharged, *viz.* burdened with more than the said moor was able to afford; they raise a declarator against the heritor of the moor, their master, to hear and see it found and declared that it shall not be lawful for him for to burden the said moor to the prejudice of the prior servitude, constituted with his own consent, (and that for most onerous causes, *viz.* sums of money paid to him therefore,) in favours of thir pursuers; and that his power of burdening the said lands may be expressly restricted, that he do nothing in the said moor which may be prejudicial to the servitude already granted to them; and what he hath already done, of that kind, the same may be declared null and void, especially considering that by their feu infeftment *unaquæque gleba iis serviebat.*

Against which declarator it was ALLEGED, 1*mo*, That it was a mere novelty, inferred an odd conclusion, and was *res pessimi exempli* for tenants to seek such a declarator against their master. 2*do*, No process at the instance of such of thir tenants against the writs of whose lands the heritor has obtained certification. 3*tio*, No process at the instance of those who have bound themselves under their hand, to the defender, that they shall never quarrel any posterior

servitudes imposed by him in the said moor. This 2d and 3d allegeances were found relevant.

Then, *4to*, the heritor of the said moor having reserved to himself the property or *jus dominii* in this moor, thir tenants, by virtue of the servitude constituted to them, can never be heard to impede the heritor from free and absolute using of the said moor at his pleasure: otherwise this inevitable absurdity should follow, that the right of a servitude should be of greater force, and be more effectual to him to whom the servitude is constituted, than property should be to the heritor; which everts the very nature of dominion. *Item*, where it is said that *unaquæque gleba serviebat*, that is not *Judaice interpretandum*, but *secundum bonum et æquum et κατ' ἐπιείκειαν*. *Item* if the conclusion of this summons were good, then the first feuar having the said privilege of casting in the said moor most amply set down in his charter, might have hindered the 2d, 3d, or 4th feuars, (to whom the said servitude was constituted in the same manner, and as amply as to the first,) from using their said privilege therein, *item* might have impeded the heritor from granting any other servitude in the said moor before his; which were very absurd. (Item, *dominium* is *jus libere utendi fruendi nisi lex vel pactum obstet*; but here the heritor's *pactum obstat*, and restricts his dominion.)

To this it was ANSWERED,—That the *ratio disparitatis* was very clear, for the reason why the 1st could not debar the 2d, 3d, or 4th, &c. is, because as yet his servitude is not prejudged by theirs, but the moor is sufficient for them all; which it is not now, in regard the same is overburdened.

The Lords laid weight on the prejudice libelled, and granted a commission for trying the same; the report whereof was, that the said moor was wholly burdened, save only three acres; whereon the Lords sustained the declarator, and restricted the heritor, that he might not burden that moor any farther; but only the three acres that were free. See 20th *January*, 1680. *Muir of Montreumont and Earl of Southesk.* *

Act. Mackeinzie. *Alt.* Lockhart and Cheap.

Advocates' MS. No. 20, *folio* 73.

1670. *June* 17. ANENT EXECUTORS.

THE Lords found that *juramentum æstimatorium* given by an executor confirmed, did not bind him for any farther nor for the prices he could get, seeing it is only *juramentum credulitatis*; though it was ALLEGED that though it could not operate against a third party, yet it should operate against the giver.

Advocates' MS. No. 21, *folio* 74.

* The Lords also found that Dunykier, the heritor, albeit he had granted servitudes of pasturage and feal and devot on this moor, yet, since before the constitution of the said servitude, he was in use to labour and till parts of the said moor, he might continue his possession of labouring and tilling, though it prejudged their servitudes, because he only constituted them as the moor then stood, and not *seipsum gravare*. See *lex* 13 D. *De usufructu, et passim dicto titulo.*

Quod omnes tangit ab omnibus debet approbari, Cap. 29. *de Regulis Juris in* 6*to. L. ult. C. de authoritate prestanda. Argumentum L.* 8. *D. de aqua et aquæ, &c. valde huc facit. Vide Dumnum eleganter ad dictam regulam* 29. *in* 6*to. Vide infra June* 1677, *No.* 579. *S.* 11. *Vide L.* 13. *S.* 1. *Digestis de servitutibus rusticorum.*

1670. *June* 18. DOUGLAS of LUMBSDEAN *against* the LADY and her SON.

THE deceased Douglas of Lumbsdean granted disposition of his whole estate in favours of his son of the first marriage, with reservation, in the body of the said disposition, of his own liferent, and of a power and faculty of burdening the same with 4000 merks, any time in his lifetime. When he comes to die, his second lady, with her solicitations, and her brother, Mr. Lylle, procures of the Laird, (just two days before he dies,) a bond for 1000 merks, to herself in liferent, and to her son (who was of the second marriage) in fee, and this conform to the power reserved to him in the disposition made to his son of the first marriage. Of this bond, the son of the first marriage, as heir to his father, raises reduction upon thir reasons; 1*mo*, That this bond can never be respected such a right as may affect the estate disponed to him, but the same must be reduced; because the said bond was never a delivered evident in the maker's lifetime, but found in his charter-kist undelivered after his decease, and so intromitted with by thir defenders, and so is a null writ. 2*do*, *Esto* it had been a delivered evident, (as it was not,) the same must be reduced *ex capite lecti*, since the same was granted by the defunct but two days before his decease, after which he never came to kirk or market; and so can never be sustained in prejudice of the heir. 3*tio*, The said bond must be reduced, because it bears only to have been granted for love and favour; seeing it is offered to be proven, that this defender is most competently provided in a jointure, and the son provided to more land than the son of the first marriage is. 4*to*, The bond must be reduced, because the granter had no power to grant the same, in regard all that was reserved to him in the disposition, was a power to affect the land with 4000 merks at any time in his lifetime; but so it is, it is offered to be proven, that before the granting of this bond now craved to be reduced, he had contracted debts above the value of 8000 merks, whereon they condescended; and so the power reserved him was expired, and he more than exceeded the same.

To thir reasons it was ANSWERED, 1*mo*, that the not delivery of it in the granter's lifetime can never be a ground whereon the same can be reduced, because the same was granted to the defunct's own wife, who was in *familia;* and to his son, an infant of two years old, who was also *in familia*, in which case no delivery was requisite. 2*do*, It can never be reduced upon the account that it was done upon death-bed, for thir three reasons; 1*mo*, Because by the reservation, he had a power at any time in his lifetime *indefinitè* to burden the lands with that sum; which must be understood as well *in articulo mortis*, as *in liege poustie*. 2*do*, None have interest to pursue reduction of writs alleged granted upon death-bed, but he who is, or may be heir to the granter; but so it is, this pursuer, the son of the first marriage, can never be heir to his father, granter of this bond craved to be reduced; because it is offered to be proven that he was got in an adulterous conjunction, and notwithstanding he may be thought to have been legitimated by his father's subsequent marrying of that woman on whom he got him, yet the 20th act of Parliament 1600, excludes such clearly from reaping any benefit by the parents, especially where there are lawful issue of another marriage. Neither can it be imagined that the act excludes the adulterous brood from succession *ab intestato* only, and not from taking dispositions from their said parents in their lifetimes; for that were *in fraudem legis facere, et legis mentem circumvenire*. 3*tio*, This bond

can never be reputed to have been done on death-bed, because the defenders offer them to prove that the maker, after the making of the same, rose, put on his clothes, sat at table, went down stairs, walked in the fields, in the same manner as he was wont to do, and did other acts of sanity; which must be equipollent to going to kirk and market. To the third reason, answers, if the pursuer think the defender more competently provided than himself, he is content to change with him. To the fourth, answers, that the defunct having disponed to this pursuer, after the contracting of the debts condescended on in the reason, his liferent of the lands disponed, (which was reserved to him in the disposition,) it is offered to be proven that he gave bond to his father, obliging him to relieve him of all debts contracted by him preceding the date of that bond, so that these debts can never be obtruded by this pursuer as the implement of that power reserved in the disposition; and if there be any debts contracted since, the defender offers to purge them.

To thir answers it was REPLIED,—1*mo*, That their being in *familia* said well to supply the not delivery of the bond, if they had not been competently provided *aliunde*, but says nothing where that is. To the second, replies 1*mo*, that the power reserved him of burdening these lands at any time in his lifetime, must not be taken captiously, *(nam verba non debent captari,)* but *civiliter et secundum terminos juris:* whereby it must be presumed that all he intended, was to keep a power of burdening these lands in his *liege poustie*, conform to the common law of the kingdom; whereas if he had meaned that his power should have reached to death-bed, he would have made it special, by reserving power *etiam in ipso articulo mortis*. 2*do*, Where it is said that a reduction *ex capite lecti* is a benefit only competent to the heir, and solely introduced in favours of heirs, that in its large extent is false; for the Lords have found creditors to have interest to quarrel writs done on death-bed, if they redound to their prejudice, though they be not heirs; and so this pursuer, *esto* he were not that person that could be heir to his father, yet this disposition gives him sufficient interest to quarrel any deeds which may any way impede his disposition from being made effectual in whole or in part, *ex capite lecti*. But 3*tio*, *Nullo modo constat* that he was procreated in the manner alleged in the answer: neither is it probable that his father and mother would have been suffered to cohabit thirty years together as man and wife, (as they did,) if any such thing had been true, considering the strictness of the late times. 4*to*, As to the deeds of sanity condescended on, *nullo modo relevant*, except Sir George Lockhart say he went to kirk and market, as he most contentiously reasoned in my Lord Balmerino's cause. To the third replies, the offer of excambion *non relevat* except they could make the pursuer as young as the defender is. To the fourth, denies there is any such bond of relief. The Lords found the allegeance on the bond of relief relevant, and assigned a day for proving it.

Act. Sinclar and Spottiswood. *Alt.* Lockhart.

Advocates' MS. No. 23, folio 74.

1670. *June* 18. MR. JAMES WEIMES *against* ——.

THIS was a suspension raised upon compensation craved against him from whom Mr. James had the bond charged on.

To which it was ANSWERED,—That there was no place for compensation here, because the suspender having granted bond to , in the name of the creditor, the said to whom it was delivered, filled up Mr. James his name in the bond, for onerous causes: so that whatever compensation may be competent against him to whom the blank bond was delivered, the same can never be objected against Mr. James, unless he offer him to prove, by the said Mr. James his oath, that his name is only filled up therein to the cedents' behoof; for he who grants a blank bond gives power to the party to whom he delivers it to fill in what name he pleases therein, and so renounces any compensation that may be competent to him against him to whom he gives the same, and tacitly passes therefrom.

The Lords found this answer relevant: notwithstanding of this reply, that compensation in law is reputed as payment, and *ipso jure* extinguishes the obligation; and therefore by the very delivery of it to one with whom he had a ground of compensation, he clearly takes away the said bond *pro tanto*, as if payment had been expressly made thereof.

Act. Birnie. *Alt.* Dewar. *Advocates' MS. No.* 24, *folio* 75.

1670. *June* 18. PROCURATOR-FISCAL of the ISLES, *against* WALLACES, Executors of the late Bishop there.

THERE was a competition betwixt the commissary of Glasgow and the commissary of the Isles, who had the right of comfirmation of the Bishop's testament.

ALLEGED for Glasgow,—That *regula regulans* of confirmations is *domicilium defuncti et ubi habebat focum et larem:* but so it is, he had his residence, his wife, his bairns, and his family, in Glasgow; and though he was Bishop of the Isles, and died there, yet he had not so much as a pot or a pan there; and when he went there it was only itinerarly, but noways *animo remanendi.*

ALLEGED for the commissary of the Isles,—That he being Bishop there, *presumptione seu fictione juris* he must be presumed to have had his residence there; at the least, by the law of God and the ecclesiastical canons, he ought to have resided there: *Item,* he divided the year and staid all the winter in Glasgow, but the whole summer he was constantly in the Isles. And where it is said he had also his armour and plenishing, both spiritual and temporal, at Glasgow; Sir George Lockhart offered him to prove he had both books and brand in the Isles: *Item,* he died there. As to the non residence Glasgow answered,—that the rest of the clergy had dispensed with that, in respect of his valetudinariness.

The Lords FIND the Isles should be preferred, if at the time of his death he was there *animo remanendi,* which they offered to prove.

Act. Wallace. *Alt.* Lockhart. *Advocates' MS. No.* 25, *folio* 75.

1670. *June* 21. HALIBURTON *against* SCOT.

IN this cause, my Lord Stair found that a man's not solvency, who had granted a disposition of before, was not to be estimated or considered as he was at the time of his decease, but as he was at the time when he made the disposition quarrelled on that head.

Advocates' MS. No. 26, *folio* 75.

1670. *June* 21. The MARQUIS of DOUGLAS *against* SINCLAIR.

THE Marquis of Douglas, in his minority, and his tutors and curators, assignes and dispones to the defender the gift of the ward of his own lands: the defender gives backbond to the Marquis, that in case he do not ratify his said deed done in his minority when he comes to be major, that then he shall be countable to the Marquis, as superior, of his intromission with the rents and profits of these ward lands. On this back-bond the Marquis charging the said Sinclair, he suspends on two reasons: 1*mo*, The Marquis can never be heard to take the benefit of the backbond, because he offers to prove by the Marquis his own oath, that since his majority he has ratified the same; in so far as he faithfully promised never to make use of the back-bond against him, but to give it him back, and so to ratify his gift: which must be equivalent to a ratification; for an obligement to grant a disposition or discharge is as good and the same thing with a disposition or discharge.

To which it was REPLIED, 1*mo*, *Non relevat* to say he promised, because the backbond expressly requires a written ratification, which cannot be shown. 2*do*, *esto*, he had promised, he may resile.

The Lords FOUND his promising to ratify, sufficient to elide the back-bond.

Then 2*do*, *et separatim*, *esto*, the Marquis on oath deny the promise, yet *frustra petit quod mox est res restiturus*: the Marquis his father, to whom the Marquis is heir by his bond, bound him and his heirs to this defender, that whensoever his lands fell in ward he should take no benefit thereby, but he assigned the same in favours of the defender; in warrandice of which deed of his father's, the Marquis will be liable, according to the rule in law, *quem de evictione tenet actio eundem agentem repellet exceptio.* (Which failyies though, in some cases in law, as in *spolio, ubi spoliatus ante omnia est restituendus.*

To this it was REPLIED,—That the defender's back-bond being posterior, and contrary to that alleged gift of the Marquis his father, he must be reputed and interpreted to have thereby tacitly past from the father's bond introduced in his favours; however, when he pursues on the said bond, he shall get an answer.

My Lord Stair inclined much to sustain this reply.

Act. for the Marquis, Lockhart and Colt. *Alt.* Cheap and Sinclair.

Advocates' MS. No. 27, *folio* 75.

1670. *June* 21. ANDREW BRYSONE *against* ——.

IN a cause of Mr. Andrew Brysone, FOUND, That a man might very well be reputed a bankrupt who died without an heir, *viz.* to whom his own son or other nearest would not enter heir.

Advocates' MS. No. 28, *folio* 75.

1670. *June* 21. GRAHAME *against* CAMPBELL.

ONE being convened to pay a debt, as vitious intromitter with the goods and geir of the debtor: this defence was SUSTAINED; No process against—&c, as intromitter; because he offers him to prove, that the defunct having died rebel, his escheat was gifted, and declared at the instance of the donatar before the intenting of this cause; and found that a donatar declared is as sufficient for purging vitiosity as an executor confirmed, seeing the intromitter is alike countable to both. The parties were Grahame and Campbell.

The next day after, this cause being again called; for eliding that defence, it was ALLEGED, that the defender had meddled and intromitted with the moveable heirship, and with heritable bonds; (and when they were desired to condescend *quomodo*, they condescended that he had meddled both with the bonds themselves, and with the sums contained therein,) *vid.* with bonds bearing annualrent, which though they remain moveable *quoad* the children, yet are heritable *quoad fiscum; item* with a comprising led at the defunct's instance, whom he was alleged to represent: None of all which falls under the compass of any gift of escheat; and so the defence of a donatar declared, (who would have no right to thir particulars) can never maintain the defender against this pursuit.

To this it was ANSWERED,—1*mo*, The moveable heirship falls under escheat; 2*do*, his meddling with heritable bonds *non relevat* to infer gestion, but his meddling with the sums of these bonds *relevat*, of their own consent; for though the meddling with a charter-kist will make a man heir *passive*, yet it were most hard that the meddling with a single paper should have the same effect. 3*tio*, As for his meddling with the comprising, he has a colourable pretext therefore: *viz.* it was *ad deliberandum*, and for inspection only. *Item*, he meddled only with the bygone annualrent owing before the defunct's decease, for which he must be countable to the donatar, *et quælibet causa, etiam minus probabilis et fatua, excusat a titulis passivis.*

This answer was found relevant.

Act. Lermont. *Alt.* Falconer.

Advocates' MS. No. 29, *folio* 75.

1670. *June* 21. Anent Clauses Irritant.

In a declarator of a failyie, or incurring of a clause irritant, through not payment of the annualrent during the space of three terms together, which clause was contained in a contract of wadset; this was FOUND a good defence to purge the failyie,—That he who sought declarator had taken annualrent for terms subsequent to those the failyie whereof was sought to be declared; and that the taking of the said annualrent was an implicit passing from the clause irritant already committed, so that no failyie could be sought but of terms after those for which the annualrent was taken.

So requisition is past from by taking annualrent thereafter: so caducity of a feu, through not payment of the feu-duty by the space of three years, is presumed remitted by the superior's taking the same for years after the feu became caduce; and not protesting for his taking the feu-duties of the years by which the feu was resolved, will not import a discharge of the caducity. *Vide L. 7. D. de lege Commissoria; et Harprechtum ad p. 3, Institu. De Locatione et conduct. No.* 479 *et seq. Vide infra, No.* 81, [16*th July*, 1670, *Chesters* against *Ker.*] So a minor cannot remove his tenant, taking maill from him for years after the warning; *Craig*, and the authors there cited, *page* 204.

Advocates' MS. No. 29, *2nd, folio* 76.

1670. *June* 22. Ronald *against* Walker.

This was a reduction (Haddo has interest therein) where two terms were already taken, and where they were calling on their act, for assigning a third. The defender excluded the pursuer with horning, so that he could not speak. Which was found might be done in any part of the process.

Act. Moir. *Alt.* Thoires and Seatoun.

Advocates' MS. No. 31, *folio* 76.

1670. *June* 22. Anent Improbation.

In an improbation, the terms being all elapsed, certification was craved, *contra non producta.*

Then ALLEGED,—There could be no certification granted; because there is a note of the writs craved to be produced, of their dates, and the time of their registration.

Replied,—Ought to be repelled, because registrate since the defender took terms, at the least since the citation given him in the improbation.

The Lords FOUND such a note satisfied not the production, and therefore granted certification.

Advocates' MS. No. 32, *folio* 76.

1670. *June* 24. ———— *contra* MACALLA.

THIS is a subsidiary action against the defender, as attester of a cautioner in a suspension, (in thir words "I attest his sufficiency for the sum charged for,") to pay the sum contained therein; because the cautioner is already distressed by horning, denunciation, and caption, and yet they cannot recover the sum off him.

ALLEGED,—The attester of a cautioner must be in the same case with the clerk to the bills, who will never be liable if the cautioner attested was sufficient the time of the attestation; but so it is, this cautioner was such, in so far as he had sums of money and lands then, far above the worth of the sum charged for.

This was FOUND RELEVANT; and they ordained to condescend on what he then had.

Act. Norvell. *Alt.* Colvill and Spotswood.

Advocates' MS. No. 33, folio 76.

1670. *June* 24. CAMPBELL of Kepock *against* TILLICHORLIE and OTHERS.

THERE was a pursuit for a boat-mail against certain feuars; which servitude was imposed of old by the Abbot of Coupar upon the proper lands of the abbacy; after which thirlage, they were feued out to sundry vassals.

ALLEGED,—Absolvitor from that mail, because they have prescribed their freedom, they being free thereof by the space of forty years.

ANSWERED,—Offers to prove, interrupted either by citation or possession within the forty years; as for the quantities, offers to prove they were used and wont to be paid by them and the other feuars of the abbacy.

ALLEGED farther,—The time of the imposing this servitude was before the lands were feued out, and when it was yet abbot's proper lands, at which time no servitude could be imposed, because *res sua nemini servit. Item*, the cause of it was that there being then no kirk at Cupar, the monks and tenants of the abbacy were forced to pass the water to the church of which stood on the other side.

This was repelled, seeing as a man may thirl his tenents to his own mill, so he may thirl them to a boat built by himself, and for the commodity of the inhabitants of his own ground; and this thirlage will affect the ground and pass with it, though it go through the hands of 1000 singular successors, and is most ordinary.

Act. Dinmuire. *Alt.* Falconer.

The parties were Campbell of Kepock against Tillichorlie and others.

Next day it being called, it was ALLEGED for one of them, that they and their authors had their lands feued out to them for payment of such a feu-duty, without any mention of that servitude; and the same was imposed thereafter: which the abbot could not do, being then denuded, unless the heritor had consented.

This allegeance was found relevant.

Advocates' MS. No. 34, folio 76.

1670. *June* 25. LORD LOVAT *against* LORD M'DONALD.

THIS was an improbation in which it was found, 1*mo*, That a service without a retour instructs the party served to be heir *passivè*, but not *activè*, and so will not furnish an active title whereon to pursue. *Vide Durie*, 18*th February*, 1627, *Simpson*. 2*do*, A general service may be led before any judge in the kingdom at the party's option, though neither the defunct nor the heir lived within his jurisdiction.

Advocates' MS. No. 35, *folio* 76.

1670. *June* 25. REID and RANKEIN *against* BURRELL.

BY a contract of marriage there is an annualrent provided to the husband and the wife, and the longest liver of them two in conjunct fee, and to the bairns of the marriage; which failyieing, to the wife's heirs. The wife's heirs are FOUND to have right thereto; notwithstanding, it was ALLEGED, That by existency of bairns of the marriage, the wife's heirs were wholly excluded, and the right of the annualrent returned back to the heirs of the husband; for they found though these bairns had been served heirs to their father, yet whenever they failyied, the wife's heirs, by virtue of the substitution of the contract, will come in as heirs of tailyie or provision to them; and notwithstanding that the father, or the heirs of the marriage, as fiars, might have alienated the said annualrent, seeing they never made use of their power.

Advocates' MS. No. 36, *folio* 76.

1670. *June* 25. Anent An ALLEGEANCE OF MINORITY.

WHERE there is an allegeance made up on minority, and for taking it away, majority is offered to be proven, the Lords are in use, before answer, to admit of a joint probation.

Advocates' MS. No. 37, *folio* 77.

1670. *June* 25. STEWART *against* STEWART.

ONE being charged upon a bond, he suspends, that the same is null, being only subscribed by the two initial letters of his name. It was REPLIED,—He offers him to prove he was in use so to subscribe at other times.

This reply was FOUND RELEVANT. Neither was it respected that the sum in the bond was 2000 merks, and so a matter of importance; for my Lord Stair called to mind where the Lords *in præsentia* had sustained a bond for L.500 Sterling, where the party subscribed only by a mark like to a craw-tae, because of the reply of use, though he was averse from it himself.

Act. Lermont. *Alt.* Yeoman.

Advocates' MS. No. 38, *folio* 77.

1670. *June* 25. WALKER *against* RONALD.

THIS was an action for proving the tenor of a writ that was lost, wherein it was ALLEGED They behoved to be clear and special *super casu omissionis*, otherwise the bond must be presumed not lost but retired.

To which it was REPLIED, it was impossible to be clear on that, viz. what way, in what part, and at what time, he lost it; for if a man remembered these circumstances, he needed not prove the tenor, but after some search he might recover the very writ. The *casus omissionis* here was, that the party to whom the bond was granted his wife foolishly and recklessly had burnt the same at a candle, at which time there being none present, and so none could depone thereon but herself.

Advocates' MS. No. 39, *folio* 77.

1670. *June* 21 and 29. ELEIS of Southside *against* DR. CARSE.

June 21.—THIS is a pursuit for payment of a debt against this defender, as representing the debtor; 1*mo*, In so far as he being his apparent heir, he meddled with his charter-kist, which, by the constant practice, infers gestion. 2*do*, As heir, he made a revocation of all deeds done by the debtor, his predecessor, which might tend to his prejudice. 3*tio*, He called the comprisers to count and reckoning, offering to prove them paid by their intromissions, and more than paid; and so craved the superplus to be given back to him.

Against his meddling with the charter-kist, it was ALLEGED, 1*mo*, That Dr. Carse, (though a Scotchman,) yet, from his infancy almost, having been bred, and having resided in England, (being one of the king's chaplains,) upon the death of his friend, he came down to Scotland; and being altogether ignorant of our laws and customs, he simply, without any intention of being heir, took inspection of some writs that were in the defunct's charter-kist, and this, within the year allowed to apparent heirs for deliberation: and within the year also, he offered the charter-kist back to those who had interest, which they refused. Which kind of meddling being so innocent, and also within the time prescribed by law, can in no equity nor reason make the Doctor liable to the defunct's debts. To the second *non relevat* a revocation, unless ye will say that something followed

thereupon; *vid.* a summons of reduction, &c. To the third, his calling the other comprisers, &c. can never bind on him a passive title, because he did it by virtue of a comprising of the reversion, the right whereof was established in his person.

To this it was REPLIED,—1*mo*, That *ignorantia juris neminem excusat.* 2*do*, He can never pretend he meddled only for inspection; seeing he should have done it *modo et via juris*, and should have had a sentence of a Judge to that effect, and not have done it at his own hand. 3*tio*, It were a most dangerous thing to find meddling with a charter-kist, (they offering it back, though within the year,) not to infer a passive title; seeing there may be none that knew what was in the charter-kist, and by this means an apparent heir might abstract the very marrow of it, and yet none should be permitted to quarrel him therefore. To the 2*d*, about the revocation, it deserves no answer. To the 3*d*, offers to prove, in that count and reckoning, he received that to which he could lay no other title nor claim but as heir to the defunct, who had the right of reversion.

Act. Eleis and Lockhart. *Alt.* Sinclair.

Advocates' MS. No. 30, *folio* 76.

1670. *June* 29.—In the cause Eleis and Carse, mentioned before on the 22d day, *referente Domino Stair*, FOUND, That his intromission with the charter-kist (proven by his receipt thereof granted to my Lord Arniston, from whom he borrowed it,) was sufficient to infer a behaviour.

Advocates' MS. No. 40, *folio* 77.

1670. *June* 29. HOYLLS *against* FALCONERS, Master and Warden of the Cunyie-house, and my Lord Halton.

THIR persons were executors to one Hoyll, who was copper-melter to thir defenders, and had of them a bond for some lignates of copper furnished by him to them; and on this title pursuing, it was ALLEGED, That they could not be heard; because it was offered to be proven that those lignates were altogether insufficient, neither dighted nor brushed from the sand, wherewith they were extremely deceived in the weight, and so sustained a huge damage and prejudice.

REPLIED,—They could not now obtrude insufficiency, since they had accepted the same on their hazard, and had in their own count-book set them down at such a price.

My Lord Stair would not sustain the allegeance, unless they would say the insufficiency was such as could not well be perceived at the time of the bargaining.

Advocates' MS. No. 43, *folio* 77.

1670. *June* 29. ———— *against* MACCUB and his SPOUSE.

THIS Maccub charges for eight bolls of beer, or the price thereof; which the suspender is decerned to pay by a decreet before the sheriff of Dumfries. The reason of suspension and reduction is, that the said decreet is null, being in absence; for though a procurator compeared, yet he had no mandate in writ. But the decreet is likewise intrinsically null, seeing the claim is proven by witnesses cited out of another sheriffdom, without letters of supplement, or rather witnesses *ultraneo comparentes:* and one of them, being the party who sold the beer to Maccub, and so (the same proving insufficient) by reason of the warrandice wherein he was liable, might gain or win in the cause, could nowise be witness; which by the decreet appears to have been proponed, and yet was repelled. On this reason he being reponed, he offered him to prove that the said eight bolls being given to him by the chargers as to a maltman, he told them the same was altogether rotten and insufficient, and that he could make very little good malt out of the same; they bade him make it upon their hazard; they should seek no more nor what he could get of it. *Item,* offers to prove by famous maltmen in the town of Dumfries, who saw the beer before he put it in the steep, and who said that it was nought.

This his intimation of the insufficiency thereof, at the time he received it, was found relevant and admitted to probation.

Weimes and Dickson.

Advocates' MS. No. 44, *folio* 77.

1670. *June* 29 and 30. ROBERTSONE, Minister of Auchterhouse, *against* The EARL of KINGHORNE, Mr. ROBERT HAY of Dronlaw, and OTHERS.

June 29.—The Earl of Kinghorne (as coming in the place of the deceased Earl of Buchan,) being charged at the instance of Robertsone, as minister at the kirk of Auchterhouse, and parson thereof, for the parsonage and vicarage teinds of the same;

SUSPENDS,—Because the Earl of Buchan being patron, and having neglected to present within the six months prescribed in law, the bishop of Dunkeld, *jure devoluto,* presented this charger; and so could present to no more than what the ministers at that kirk of before were in use to receive; but, *ita est,* it is offered to be proven they have ever been in use to serve for a modified stipend, (though no locality can be produced,) and were never presented to the parsonage.

It was ANSWERED,—That such a use *non relevat,* unless the suspender propone on some right, by tack or otherwise, in his person, to these teinds, from the parson (for it was a parsonage) or other titular.

My Lord Stair inclined much to find, that *jus devolutum* (as this was) could reach no farther than to what the ministers of that place were in use and possession of before; seeing *nihil novi juris tribuit:* although it was answered, The bishop, *jure devoluto,* might present to all to what the patron might; but the

patron might have presented to the whole parsonage and vicarage. Yet he was content to give them the Lords' answer on it.

Act. Charger, Lermont and Lockhart. *Alt.* Spottiswood.

Advocates' MS. No. 42, folio 77.

June 30.—IN the foresaid cause of the minister at Auchterhouse against Mr. Robert Hay of Dronlaw and others, the Lords found it not worth the taking to interlocutor about the *jus devolutum*, and therefore found that the Bishop *jure devoluto* might present to all which the lawful patron might have presented to. Yet where he sought six chalder of victual, as the parsonage and vicarage teinds, yearly, for the space of eight or ten years; the Lords assoilyied the defenders therefrom, viz. from all bygones, in respect of their *bona fides* to continue the former use and custom; but find the minister has right to the haill parsonage in all time coming. *Advocates' MS. No. 46, folio 77.*

1670. *June* 30. ANENT BONDS of PRESENTATION.

ONE being charged on a bond wherein he was bound either to sist another at such a day, or to pay such a sum, *nomine pœnæ;* he suspends that he must be liberate from that bond, (though in the same he seemed to renounce *omnibus casibus fortuitis,)* because he offers him to prove that the party whom he should have sisted, was sick of a fever, and not able to come out of a bed at the time, and none is tied to things impossible. This was found relevant.

Vide infra No. 58, July 2, 1670.

Act. M'Kenzie. *Alt.* Lockart. *Advocates' MS. No. 47, folio 77.*

1670. *June* 30. The BISHOP of ROSS *against* DONALD FOULLER.

THE Lords would not sustain this as a relevant reason of reduction of a bond: That it was granted by one taken with caption, and by reason of sickness upon his body unable to go to prison, (all which the very bond narrated;) since that is *metus justus et licitus*, being done *authore prætore.* Yea, they found a man being charged with horning on a decreet, and taken with caption, and then, in the hands of the messenger, granting such a bond, that the said bond was a homologation of the decreet: though a man cannot be properly said to homologate but where he has a free consent, which is not here. *Vide L. 22. D. quod metus causa; et Cragium, pagina* 127.

Act. Anderson. *Alt.* Seaton. *Advocates' MS. No. 48, folio 77.*

1670. *July* 1. ANENT COMPETENT and OMITTED.

ONE being charged on a decreet, suspended upon a reason: To which it was ANSWERED, That the same could not now be received, because it was competent against the decreet and omitted. To which it was REPLIED, That the defence of *competent and omitted* could not be objected where the decreet was obtained before an inferior Court, as this was.

My Lord Stair found, if it had been in *re ardua et difficili*, which the ordinary procurators before these Courts could not well understand, that their omitting of a defence then would not have secluded the party from proponing of it now: but being *in re facili et levis momenti*, he found it relevant.

Act. Mr. Thomas Murray. *Alt.* Leirmonth.

Advocates' MS. No. 49, *folio* 78.

1670. *July* 1. A poor Englishwoman, FRANCISCA HEATH, *against* my LORD LUNDORS.

THIS was a pursuit for her entertaining him by the space of fourteen or fifteen weeks at London, conform to his subscribed account.

ALLEGED,—The account is null, because it wants writer's name and witnesses.

ANSWERED,—Refers the verity of the subscription to his oath.

REPLIED,—She cannot be heard, except she likewise refer, that the sum is yet resting owing, to his oath. The Lords repelled the reply.

2do, ALLEGED,—That he being incarcerated in the King's Bench at London, for this same very debt, he was set at liberty; in which cases, it is offered to be proven that the keeper of the Bench becomes solely and privative debtor for the same; so that the debtor can no more be pursued. This allegeance was found relevant; they proving the custom. Which, if it were cumulative, would seem just; but as it is conceived, seems very unreasonable.

Act. Mr. William Baillie. *Alt.* Cheap.

Advocates' MS. No. 50. *folio* 78.

1670. *July* 1. The MASTER of GRAY *against* RAMSAY.

THIS is a declarator of non-entry at the superior's instance against his vassal. Against which it was ALLEGED, That the lands were full, the years acclaimed; in so far as the defender had comprised the same, and was infeft therein, at least had charged the superior. Which allegeance the Lords sustained for stopping all declarator of non-entry for all years from the date of the infeftment, or of the lawful charge.

Then REPLIED,—That they offered them to prove that that comprising was satisfied by intromission within the years of the legal. This reply was sustained, *ad hunc effectum*, that declarator might be sought for the non-entry of all years since the extinction of the comprising.

Then ALLEGED,—That thir lands holding feu, all that would befall to the superior by reason of the non-entry, was only the retoured maill, viz. the feu-duty before declarator; but *ita est*, the feu-duties for the most part of the years acclaimed are paid and accepted of by the superior. This was found relevant to liberate from declaring the non-entry of such years whereof the feu-duty was paid; but prejudice to crave declarator for the years subsequent: notwithstanding that Sir Robert Sinclair represented, that though, by the common practique, the superior, where his vassal is in non-entry, has nothing but the retoured duty before declarator; yet the same seems altogether unreasonable, seeing by that the superior shall be in no better case, the vassal's lands being in non-entry, nor when the vassal is entered; for in both he has only the feu-duty: and therefore Sir Robert thought the superior should have the retoured duty by and attour the feu-duty, (which he gets though the lands be full,) for all years wherein the lands are in non-entry preceding declarator. This was repelled; because the superior's benefit lies properly here, that as soon as the lands fall in non-entry, he may get the same declared, and then he has right to the hail mails and duties of the land.

Advocates' MS. No. 51, folio 78.

1670. *July* 1. GEORGE STEWART of Auldham *against* SIR ALEXANDER ACHINMUTY's Relict.

THIS was a pursuit for the mails and duties of some lands whereof he had assignation from the deceased Sir Alexander Achinmuty. Compeared the said Sir Alexander's relict, and ALLEGED,—She was infeft in the same lands, though posterior to his assignation, yet, as a singular successor, behoved to be preferred to him.

The Lords preferred her, because of her infeftment: neither would they sustain his allegeance of ten years possession of the lands, to produce him the benefit of a possessory judgment against her.

Act. Ipse *et* Lockhart. *Alt.* Dunmuire and Sinclair.

Advocates' MS. No. 52, folio 78.

1670. *July* 2. SCOT of Bevelay *against* BINNY, his Mother-in-Law.

THIS was a pursuit at the pursuer's instance, as heir to his father, against his father's relict, as executrix to him, for implement to him of an obligement contained in his father's contract of marriage with his mother, his first

wife, obliging him to employ the sum of to the heirs of the marriage; which he craves to be fulfilled to him as heir of provision of the said marriage.

ALLEGED,—The obligement which is the ground of the pursuit is heritable, viz. to employ upon land or annualrent, and therefore is not prestable by the executor, but only by the heir, which the pursuer's self is; and so the obligation is confounded, he being both debtor and creditor to himself; and alleged the practique *Wilson*, where this was found.

ANSWERED,—That the same being only a destination, it noways made the obligement heritable.

My Lord Stair was content to give them the Lords' answer on the same. *Vide Dury*, 12 *March*, 1622, *Fairley*.

Act. Lockhart. *Alt.* Cunyghame.

Advocates' MS. No. 53, folio 78.

1670. *July* 2. DUMBAR *against* Mr. MURDOCH M'KEINZIE, Bishop of Murray.

THIS was a declarator at this Dumbar's instance against the Bishop and his son, Commissary of Murray, to hear and see it found and declared, that he has the sole and undoubted right of the Commissary clerkship of Murray in all time coming; and for bygones, craves repetition of the whole benefits and obventions of the said office, ever since his unjust and illegal deprivation by the Bishop. It being demanded by the Bishop, by what right or title he laid claim to that office, it was ANSWERED,—He had right from Mr. John Hay, who was established Commissary of Murray, by the King himself his gift under the great seal, in 1646, and ratified thereafter in Parliament; who by his said gift had power to elect and choose such clerks as he pleased himself; which clerks so chosen by him, were to bruik *ad vitam:* and, conform to this power, he nominated this pursuer clerk, who ever continued in the peaceable possession thereof till the act of restitution of Bishops in 1662; at which time the defender, most unorderly thrust him out, and placed in his own son, who has ay possessed sinsyne.

Then the Bishop ALLEGED,—That his right was null, and so could not be declared, because he was placed *a non habente potestatem* to place him: in so far as, *esto argumenti causa*, the gift granted to Commissary Hay had borne an express power to place a clerk, the same was only *stilus curiæ*, and could operate nothing in prejudice of the King, (who at that time, notwithstanding of the gift, might have disposed on the said clerkship to whom he pleased,) nor of the Bishops, who, by the act of restitution, were stated in his place: and they called to mind a practique in 1647, betwixt the Bishop of Galloway and ———, where the Bishop having empowered his Commissary to choose and admit procurators, it was found, by this power, he could not enter a procurator fiscal. But 2*do*, The dispositive clause, in all writs, (whether they be charters, gifts, or other writs,) being that which regulates the whole tenor and

strain of the writ; where any thing is omitted out of the same, it is noways understood to be transmitted at all. *(Vide Cujacium, pagina* 150, *circa medium.)* But so it is here, there is no mention in the said clause of the gift of the Commissary clerkship, or of any power of establishing a clerk.

To thir two it was ANSWERED,—That it was sufficient the power was in any part of the gift. They were to have the Lords' answer on this.

Then ALLEGED,—*3tio, Absolvitor* from this pursuit, because it is offered to be proven, that the pursuer has homologated the right of the said office, inherent in the defender's person, and has past from any pretended right of his own; in so far as he, by a subscribed minute betwixt him and the Bishop, has acknowledged the Bishop to have a good right, and has renounced his own claim, and condescends to deliver up the registers and other writs concerning the office, providing the Bishop pay him by the space of three years, 300 merks yearly; which the Bishop is content to do. *Vide Dury,* 17th *February* 1624, *Thomson.*

To which it was ANSWERED,—That for the Bishop to found on that minute, is *propriam turpitudinem detegere;* because it is offered to be proven, that when the act of restitution of Bishops was making, the defender sent frequently for the pursuer, and showed him how the King and Parliament were about the restoring of Bishops, *in integrum,* to all their former privileges and concessions, and the cassing and annulling of all provisions to offices procured in the time of the troubles. *Item,* presently on the making of the act, he caused double the same; only he kept out the *salvo* that was made in favours of commissaries, their clerks, and others who were in possession of their offices; and so mutilated, did show it to the pursuer, and told him that was the act made: which false and disingenuous representation was the impulsive cause and inducement that moved the pursuer to enter in that contract with the Bishop; and he never discovered his error till the act was published, bearing *in gremio* a reserve *ut supra.*

It was REPLIED,—This was *ignorantia juris,* which excuses none, and can never liberate him of the minute, he being then *major, sciens, et prudens,* and a man that knew the law of the kingdom, at the least should have known the same.

The Lords FOUND the reason relevant to be proven, either by the Bishop's oath or the witnesses present at their communing.

Advocates' MS. No. 54, *folio* 78.

1670. *July* 2. THOMAS CRAWFURD *against* his TENANTS.

This was for mails and duties. Compeared one, who had comprised the same lands, and craved to be preferred, in respect he was in possession, in so far as he had obtained a decreet of removing against the tenant possessor thereof. The Lords FOUND this decreet of removing a sufficient qualification of possession; and would not suffer Thomas Crawfurd to reply that he behoved to be preferred to this compriser, because he had an inhibition against the common debtor, anterior to the compriser's very ground of his debt; only reserved to him reduction on his

inhibition as accords. But where he REPLIED, The compriser was satisfied, either because he had intromitted, or might and should have intromitted, seeing he debarred others having right; the Lords FOUND this relevant, and ordained them to count and reckon.

Act. Wallace. *Alt.* Andersone.

Advocates' MS. No. 55, folio 79.

1670. *July* 2. GEORGE MONTEITH *against* GEORGE ACHESONE.

THIS was a pursuit, for making payment of some money contained in a precept drawn on the defender, and accepted by him; as also for sundry other particulars which I do not remember.

Advocates' MS. No. 56, folio 79.

1670. *July* 2. PENNICUIK, Chirurgeon, *against* HAY.

THIS was a charge on a bond. The reason of suspension is, The bond is null; it wants witnesses. ANSWERED, he produces also the suspender's letter, acknowledging the debt. REPLIED, the letter *laborat eodem vitio*, and so cannot prove. DUPLIED, he refers the truth of the subscription to the suspender's oath. This was found relevant.

The second reason is, That as a bond granted by a minor having curators without their consent is null, so a bond granted by a minor *in familia paterna* without his father's consent: but such is this bond. ANSWERED, denies he was minor; *2do, esto*, he had been then minor, he can never be free of this bond, because it is offered to be proven it was granted for medicaments furnished by the charger to the suspender in his sickness.

The Lords assign a term to the suspender to prove he was then minor; and though that were proven yet they will sustain the bond *pro tanto* as shall be proven furnished.

Act. Dinmuire. *Alt.* Yeoman.

Advocates' MS. No. 57, folio 79.

1670. *July* 2. Anent a BOND of PRESENTATION.

ONE being charged to pay a penalty contained in his bond, by which he was obliged either to sist a certain person taken with caption, at such a precise day, or else pay such a sum; because he had failyied in sisting the debtor:—

ALLEGED,—1*mo*, *Absolvitor* from the penalty, because there is no day expressed in the bond at which he was liable to sist him; and therefore he was not obliged to sist him till they required it, which they never yet did.

Vide infra, *No.* 409, [3*d July*, 1673, *Seaton* against *Forbes*;] and 699, [1*st January*, 1678, *Cleilland* against *Lockhart*.]

REPLIED,—They offered to prove by the defender's oath he engaged to present him betwixt and such a day, and that it was so agreed upon, though it be omitted in the bond. This was FOUND RELEVANT.

That 2*do*, ALLEGED,—He could not be bound to sist him at that day, because he offers him to prove he was then lying bedfast of a very heavy sickness, which behoved to purge his failyie. Sir George Lockhart remembered the same was found relevant to himself, in an action some few days before, *viz.* on the 30th of June, 1670, (it is *No.* 47, *supra*,) seeing the same was *casus fortuitus*: yet he contended that the defender had yet incurred the penalty, in so far as he was obliged (not indeed to sist him when he was lying sick and unable,) but *primo quoque tempore*, so soon as he was able to come abroad and travel; which they did not, and therefore must be liable. REPLIED,—That they needed not offer him till they were required. Which was REPELLED; since here *dies interpellat pro homine*, and therefore they found it was the defender's duty to have offered him as soon as he was in a condition to come abroad.

Then they ALLEGED,—They offered them to prove he has ever since lain sick and unable to come abroad. Which was FOUND RELEVANT.

Act. Lockhart. *Alt.* Cheap.

Advocates' MS. No. 58, *folio* 79.

1670. *July* 2. Sir ALEXANDER CUNYGHAME of Camskeith *against* The TOWN of HADINTOUN.

THIS was a charge for delivery to him of a cup, or of L.15 Sterling as the price thereof, which the said town was decerned by the commissaries to make payment of to him as he who had won the same at their horse race. The reason of suspension was, that this being about a horse race it was noway a consistorial matter, and so the commissaries were not judges competent to the same; but *esto* they had been judges, they committed manifest iniquity, in so far as they repelled an unanswerable defence in law, *viz.* that Camskeith could never be heard to seek the cup, because they offered them to prove that, being weighed at the louping on and at the leaping off, he was lighter when he leapt off than when he began, and so can never plead the cup; and this, though the same was proven by the judges sworn and appointed for weighing them.

ANSWERED,—This is *jus tertii* to the town, and noways competent to them but only to the second rider, who compears not; *item*, denies there were any such persons sworn to weigh them; as also to prove the custom in that place is that they do not weigh them at their leaping off, which special custom must derogate to

the general custom of weighing them elsewhere, *quia specialia derogant generalibus.*

This custom was found relevant.

Act. Charger, Cunyghame. *Alt.* Sinclair.

Advocates' MS. No. 59, *folio* 79.

1670. *July* 5. CALDERWOOD *against* HANDIESYDE and SHAW.

THIS is a reduction of a disposition, 1*mo*, Because granted on death-bed. 2*do*, On the act of Parliament 1661, preferring the creditors of the defunct to the creditors of the apparent heir. 3*tio*, On the act of Parliament 1621, anent dispositions not made for onerous causes.

To this last, it was ANSWERED,—That the disposition itself bore that it was made for onerous causes.

REPLIED,—That he behoved to prove the onerous causes for which it was granted otherways than by the disposition itself.

DUPLIED,—If the disposition had been *inter conjunctas personas*, then he confesses he ought to have instructed the onerous causes, albeit the disposition had borne the same: but being among strangers, he needed not; especially considering the defender is willing to give his oath upon the onerous equivalent causes thereof.

The Lords REPELLED the reason and reply, in respect of the answer and duply.

Then ALLEGED,—That the disposition bore only in general, that it was granted for causes onerous, without condescending on the special causes thereof; which was not relevant.

REPLIED,—It were a hard thing to reduce all dispositions bearing only, in general, causes onerous.

The Lords REPELLED the allegeance, in respect of the reply.

Act. Chalmers. *Alt.* Lermont and Sinclair.

Advocates' MS. No. 60, *folio* 79.

1670. *July* 5. The PROVOST and BAILIES of RENFREW *against* PORTERFEILD of that Ilk.

THIS is a reduction by this town, of a decreet arbitral, proceeding upon a submission entered into by the Provost then, (in name of the town,) *in anno* 1632, with this defender, anent some lands belonging to the said town, in property or as common good. The reason was, that the said town, and far less the provost by himself, had no power to enter into a submission anent their property given them by his Majesty's predecessors, with this express condition, that it should not be leasum to them to annalyie the same: but their submitting is a sort of aliena-

tion; *item*, the same is prohibited by sundry acts of Parliament. *Vid.* James VI. 6. Parl. 13, act 181; and Parl. 1587, act 112.

Act. Lockhart. *Alt.*

Advocates' MS. No. 61, *folio* 79.

1670. *July* 15. JOSEPH DOUGLAS and ——— PRINGLE, his Spouse, *against* the Eldest Daughter of PRINGLE of Soutray.

THIS is a reduction and improbation of a testament made by the deceased Pringle of Soutray, wherein he nominates his eldest daughter his executrix and universal legatrix, and so leaves her his whole moveables, to the clear prejudice of his other daughters, of which the pursuer's wife is one. The reason is, that though this testament was subscribed indeed by the defunct, yet it is offered to be proven that the nomination of the defender, as executrix and universal legatrix, &c. was filled up after his decease: and so the testament is altogether null; the nomination of an executor being *caput et fundamentum testamenti*, and so essential a part thereof, that *eo omisso totum testamentum corruit.*

ANSWERED, 1*mo*, That the reason ought to be repelled, because, though the nomination was filled up after the defunct's decease, yet it was so done by special order from the testator, and so must be sustained as done by him before his decease. 2*do*, Though it was not filled up till after his decease, yet by his own hand, in his testament, he had done the equivalent; in so far as he had nominated this defender his heir to his whole goods and geir, as well moveable as unmoveable, as well real as personal; which, though it would never reach his real estate, yet certainly will import the same as if he had nominated her his executrix and universal legatrix.

REPLIED,—To the first, that that order was only nuncupative, and so makes the testament nuncupative, which is null and ineffectual by the law of Scotland. To the 2*d*, the testament wanting a formal nomination of an executor, (which is the essence and being of it,) it can never subsist, but is null and altogether unvalid.

DUPLIED,—To the first, that that testament is only nuncupative whereof no part is redacted in writ, but the same was wholly delivered before witnesses; so then this testament quarrelled can never be reputed a nuncupative testament. To the second, a testament by our law is good and valid, if a man leave a legacy, one or more nominated tutors to his children, though he makes no nomination of an executor in the same. Yet *jure civili, testamentum in quo non erat institutio heredis erat nullum.*

Act. Lockart. *Alt.* M'Keinzie.

Advocates' MS. No. 62, *folio* 80.

1670. *June* 29, and *July* 6. SIR JAMES RAMSAY of Benholme *against* ELEIS.

June 29.—THIS was a reduction of a comprising, because the same was led *contra non habentem potestatem, viz.* against one denuded of the property of the lands, in favours of the pursuer's author, long before the leading of the apprising; and of an inhibition *quoad* the reducer, because the disposition was made to his author, before the inhibition was executed at the market cross of the sheriffdom where the lands disponed lay.

Advocates' MS. No. 41, *folio* 77.

July 6.—In this reduction they had another reason besides that above set down, *viz.* that no respect could be had to the apprising nor inhibition, because there was a decreet of certification granted against the bond which is the ground both of the inhibition and apprising, for not production, and so all that followed thereupon must fall *in consequentiam.*

ANSWERED,—That the said bond being registrate before certification was granted, an extract of it was produced, which appears by the minutes; and so the certification was unjustly granted. Replied, it was not enough to produce the extract, but they should have produced the principal; at the least, if it was registrate in the books of Session, they should have given in a note of the date of it.

My Lord Stair FOUND the principal needed not to be produced, it being registrate, and that the extract satisfied the production, as well as a note of the date would have done, seeing it was the equivalent; and therefore annulled the certification.

Advocates' MS. No. 63, *folio* 80.

1670. *July* 6. SIR GILBERT STEWART of Polkaik *against* STUART.

THIS was an action for reparation of his honour, in so far as the defender had slandered him by avowing openly and frequently, that the pursuer, being Commissary of Dunkeld, had torn out of his books a confirmed testament, which the defender having use of for proving something, he could not get it.

Advocates' MS. No. 64, *folio* 80.

1670. *July* 6. The LAIRD of EDMISTON and His LADY *against* MAJOR BIGGAR, as having married the Heir of Wolmet.

THIS was a declarator that the pursuer and his lady might be liberated and freed of a mutual or reciprocal contract, at least a minute thereof, past betwixt the Lady Edmiston's father and the deceased Laird of Wolmet, in regard the defenders nor their predecessors had not fulfilled their part of the said contract. In

this case, I think, if the defenders did make offer to fulfill their part of the contract, the Lords will ordain the pursuer to adhere to the contract, and will never annul the same. *Advocates' MS. No.* 65, *folio* 80.

1670. *July* 8. Anent PURSUERS DELAYING to INSIST.

WHERE a pursuer in an ordinary action, or a charger in a suspension, defers and refuses to insist; the most effectual way to force them is by raising a summons narrating the action or charge, charging the pursuer to insist; with certification, if he do not insist, he shall never be heard thereafter to insist in that action; and the protestations put up for not insisting, or decreets suspending the letters ay and while the charge be produced, are but elusory. *Ita Norvell.*

Advocates' MS. No. 66, *folio* 80.

1670. *July* 8. SIR GEORGE LOCKHART *against* JAMES STEWART.

IT was contraverted betwixt Sir George Lockhart, and James Stewart, if a messenger, as judge to the formality and leading of apprising, can adjourn or continue the diet of the apprising from one day to another. Sir George, Sir Robert Sinclair, and many others, thought he had no such power, since the diet and citation of the defender to see the comprising led on such a day was peremptory, not bearing "with continuation of days," and otherways comprisings (which of themselves are most solemn and public acts) should be all carried on clandestinely: yet thought he might prorogate upon urgent necessity, or on just and lawful causes, or where there were impediments why he could not keep that day; yea, Sir Robert called it a novelty or heresy in law, to say he could continue; and thought any comprising that bore any such adjournment was *ipso facto* null. Yet James Stewart, and Mr. George Norvell, had seen such comprisings, and alleged that any ordinary jurisdiction in Scotland might prorogate, but such was the messengers', they being appointed by the acts of Parliament judges to comprisings; and such adjournments are ever done *periculo petentis*, and if any be lesed thereby, they have a remedy, *viz.* to complain to the Lords. *Vide infra Num.* 216, [12 *July* 1671, *M'Pherson* against *Murray.*]

Advocates' MS. No. 67, *folio* 80.

1670. *July* 9. LIDDELL *against* SIR DAVID OGILBIE.

THE deceased Laird of Cullene being about to marry his daughter on Raploch's son, writes in to this Liddell, merchant in Edinburgh, desiring him to send him some velvets and other silks, &c. and obliges him to repay him thankfully; which

Liddell does. Then Cullene dies. Liddell pursues his Lady as executrix to her husband, to pay the price of the ware furnished, conform to her husband's obligatory letter; and recovers decreet. On which he charges the Lady and Sir David, now her husband, *pro interesse*; who suspend on this reason, that the letter, which was the ground of the decreet recovered against her, having miscarried, so that the charger cannot now show the same, they cannot safely pay the sum; seeing in their tutor counts with young Cullene this sum contained in this decreet will not be allowed them, unless they can produce the letter, or say that in the decreet given against the lady, Cullene was also called.

To the which it was ANSWERED,—That the decreet bearing it was given on that letter will be sufficient exoneration to Sir David, and will ever produce allowance to him of that sum, when he comes to count with his pupil; for a decreet bearing the production of a letter, bond, or any other writ, or bearing that it proceeded upon such or such writs, which were seen then by the judge, it is *probatio probata*, though that these writs cannot be now shown.

REPLIED,—That a decreet, except the verifications thereof were assigned to him, will never infer exoneration to Sir David, nor work him relief against Cullene; seeing Cullene will say this decreet is *nihil ad me*, it is *res inter alios acta*, I was not called to it, and so cannot prejudge me, or bind that debt of my father's on me; and, therefore, if Cullene and his tutors will but declare that he shall allow to this suspender the sum contained in the decreet, he will presently make payment of it.

This was found relevant.

Charger, Wallace. *Alt.* Lockhart and Falconer.

Advocates MS. No. 68, *folio* 80.

1670. *July* 9. SANDILANDS *against* CLERK and WALKER.

THIS was a reduction of a decreet of the admiral, whereby the admiral had decerned this pursuer (as he who had bought the ship,) to pay 500 dollars as the fraught convened upon betwixt the skipper and Sandilands his author, of the ship to the skipper, upon this reason of iniquity, That albeit by the laws and customs of all Admiralty Courts in the world, *omnia invecta in navem* are *tacite* hypothecated to the skipper for his fraught, so that he has *jus retentionis ratione tacitæ istius hypothecæ* of the whole goods fraughted in the ship, that either he may detain them in the ship, or hinder them from being transported off the shore, till such time as he be paid of his fraught; but it is againt all law or reason for any man to think or say that he should have any real right of hypothecation in the ship itself, so that it shall not be leasum to the several owners of the ship to sell their parts of it till the skipper be first satisfied of the fraught, or if they do, that the ship is transmitted with the clog and burden of a hypothec for the fraught.

ANSWERED,—That where the fraughter is a stranger, that has no interest in the ship, in that case indeed the skipper has only an hypothec in the goods that are in the ship, and not at all in the ship itself; but where he is not an extraneous par-

ty, but has an interest in the ship, (which is our case,) then, in all sense and reason, the ship, at least his part thereof, must stand engaged to the skipper for his fraught, and must be interpreted to be *debitum reale;* and so whoever comes in his right thereof, *etsi transierit per mille manus*, must be liable for it.

This was very hotly debated betwixt Sir George Lockhart and Sir John Cunyghame, who was for the reducer.

Advocates' MS. No. 69, *folio* 81.

1670. *July* 13. LYON of Muresk *against* ———

IN this cause it was resumed, how oft the Lords have found, that *possessio in mobilibus non solum præsumit sed et dat titulum;* for this was a pursuit at the pursuer's instance, as executor confirmed to ———, against the defender, as he who had intromitted with the moveable goods pertaining to the defunct.

The DEFENCE was,—That he could never be pursued for these goods, because he had acquired them *titulo et jure emptionis* from ———, who possessed the said moveables by the space of thirty years, before the intenting of any action therefore: and it was alleged, that if any creditor to the defunct had poinded them, the defunct's executor could never have repeated the same. *Item*, if my goods be grazing by the space of two or three years with another man, and be poinded upon the ground for that other's debt, there will be no *rei vindicatio* sustained against the poinder, but the owner has his recourse against him to whom he gave them in grazing; and so it was inferred, that possession would give them the same benefit here. ANSWERED,—That no possession can satisfy for giving a right to moveables, unless they possess them by the space of forty years, and so prescribe the same. This went to interlocutor.

Then ALLEGED,—*2do*, No process for the moveable heirship, and for the doors, windows, irongate, and sundry other things fixed in the house, and so *pars soli et ædificii*, and noways moveable nor confirmable, though they have foolishly confirmed the same.

The pursuer restricts his summons to such goods as are truly moveable.

Act. Thoires and Cunyghame. *Alt.* Birnie and Wallace.

Advocates' MS. No. 71, *folio* 81.

1670. *July* 13. DUKE of HAMILTON *against* The TENANTS of Lesmahago.

THIS was a declarator of the property of the Moor of Dovan, intented by the Duke, against divers gentlemen lying adjacent and contigue to the said moor. ALLEGED for the Laird of Stainebyres, that there can be no process, because there is nothing produced but the Duke's seasine of the barony of Lesmahago, whereof this moor is alleged to be part and pertinent; which being only the as-

sertion of a notary, cannot prove till the warrant of it be produced. ANSWERED, he shall produce the charter *cum processu*. This was FOUND RELEVANT.

Secundo, ALLEGED,—The property of this moor could never be declaimed at the Duke's instance, because it was offered to be proven for Stainebyres, and divers other gentlemen who lie adjacent to the moor, that they stood infeft in their lands by the abbots of Kelso, (of which abbacy, Lesmahago and their lands were a part,) and in whose place, the Duke, as lord of erection, was come; and were in possession of this moor as a commonty past all memory of man, and so had prescribed a right of pasturage there, and so can never be declared the property of any other man; yea some of them were infeft in their lands *cum communi pastura*, which could be exponed of nó other commonty but this moor. And in fortification of this their possession, it is offered to be proven, that the Duke himself, under his own hand, gave warrant to some of his own vassals having also a common interest in that moor, for dividing the said moor betwixt them and the said defenders.

REPLIED,—That their exception, being only upon a servitude of pasturage, was very consistent and compatible with his declarator of property; and therefore he craved the property might be declared to appertain to the Duke, and reserve them action for constituting a servitude therein, as accords.

Act. Harper. *Alt.* Lockhart and Wallace.

Advocates' MS. No. 72, *folio* 81.

1670. *July* 13. LORD ELIBANK *against* WALTER and JAMES SCOT.

MY Lord Elibank having sold his wood of to Walter and James Scots for 17,000 merks: and they being by contract obliged to cut the same in seven years, and to inclose and fence the same yearly as they cutted it, they neglected the fencing of it. Whereupon my Lord charging them for damage and interest sustained by him in not fencing;

They SUSPENDED on this reason,—That by the contract, they were not obliged to enclose the same yearly as they cutted it, that being a thing almost impossible, but only to enclose it after it was wholly cut.

The contract being read and considered, it was found they were bound yearly to fence it. Then they offered to purge the failyie, by fencing it in time coming, and craved a day betwixt and which they might do the same.

ANSWERED,—That can never assoilyie them from the damage already sustained, through the not timeous fencing thereof.

The Lords appointed them to inclose betwixt and such a day; and, in the interim, a visitation of the wood, for considering in what condition the same is, and what prejudice my Lord has sustained through the suspenders' their default.

Char. Eleis and Sinclair. *Alt.* Pringle and Lockhart.

Advocates' MS. No. 73, *folio* 81.

1670. *July* 13. The COUNTESS of DUNDIE *against* The TOWN of DUNDIE.

THE Countess, as donatrix to her husband's liferent escheat, (who was superior to sundry lands holden by the town of Dundie of him,) pursues the town and magistrates thereof, to pay to her the feu-duties of these lands, with the mails and duties of the mill of Baldovin, wherein her husband was infeft.

ALLEGED,—They offered to prove they were infeft, and seven years in possession of that mill, by virtue of their right before the intenting of this cause.

ANSWERED,—They could not be heard, unless they condescend by whom they are infeft, for if any such infeftment be, it is offered to be proven the same is only subaltern, and proceeding from my Lord Dundie's own predecessors.

REPLIED,—They needed not condescend; because it being notour that the whole evidents of that town were burnt, and the town having made their application to the Parliament, they ordained in all pursuits, either for or against Dundie, it should be lawful to them to make up their writs so lost by sic adminicles as they could find, without putting them to the necessity of proving their tenors.

They are ordained before answer to produce their act of Parliament, and *hinc inde* to produce all such writs as may tend to clear the cause.

Act. Lermonth and Lockhart. *Alt.* Dinmuire and M'Keinzie.

Advocates' MS. No. 74, *folio* 82.

1670. *July* 14. WISHART *against* Children of Mr. WM. ARTHUR and LEYES.

IN this cause it was debated, (it being a declarator of the extinction of an apprissing by intromission, at the instance of one who had a disposition of the lands apprised,) 1*mo*, that a naked disposition, whereupon no infeftment had followed, could never give the pursuer an interest to annul the apprising in the manner libelled, unless he had been *per expressum* assigned to the legal reversion, and that assignation had been registrate conform to the act of Parliament *in anno* 1617. 2*do*, That a naked disposition without infeftment, could give a party no right to call for the mails and duties of lands. 3*tio*, That a disposition, until seasine follow thereon, which is made public by its registration, is no way a public right against a compriser, or any other third party.

Act. Home. *Alt.* Maxwell.

Advocates' MS. No. 75, *folio* 82.

1670. *July* 15. The EARL of WINTON *against* JAMES INGLIS.

THIS James having been the Earl's chamberlain, and about a year ago having ended counts with my Lord, he was found my Lord's debtor in L.10,000, for which he grants bond to the Earl; this bond is lost someway by sloth. The Earl by his commissioners, whom in his absence of the country he left to oversee his

estate, intents an action for proving the tenor of the bond; and refers all to the defender's oath; both the bond, its contents, and that the same is not as yet paid.

This was FOUND RELEVANT, and a day was assigned to produce him to depone, and it was granted he should depone in presence of the witnesses in the bond.

Act. Seaton. *Alt.* Inglis.

Advocates' MS. No. 76, folio 82.

1670. *July* 15.

THERE was an action at Sir Robert Sinclair's instance, of declarator of his gift of *ultimus hæres* of the Laird of Halcro in Orknty, against the heirs female thereof.

Advocates' MS. No. 77, folio 82.

1670. *July* 16. The VISCOUNT of STORMOND *against* The EARL of NORTHESK.

THE Earl of Northesk, then Earl of Ethil, having employed the Viscount of Stormond, by his missive letter, to procure to him the change of his title of honour; declaring that what he should expend in doing thereof, he should thankfully repay the same. The Viscount, having procured the same by the mediation of Mr. Andrew Hay, and having given above L.100 Sterling therefore, pursues the Earl upon his missive, for reimbursing him that and his other expences. Their defence was upon compensation.

Act. Mr. William Murray. *Alt.* ———

Advocates' MS. No. 78, folio 82.

1670. *July* 16. The EARL of WEIMES *against* The MARQUIS of DOUGLAS.

THIS was a pursuit for relief of cautionary paid by the Earl for the Marquis his father.

ALLEGED, 1*mo*, A great part of the sums paid were bygone annualrents, of which he can never be heard to crave annualrent. REPLIED, Ought to be repelled, in regard a cautioner ought to be freed of all damage and interest incurred by him thereby. The Lords FOUND he should have annualrent of the annualrent id.

ALLEGED, 2*do*, He can never be heard to seek relief unless he say he paid it on a distress. REPLIED, The bond was registrate by the president against him. The Lords FOUND that sufficient distress.

Act. Cheap. *Alt.* Lockhart and Colt.

Advocates' MS. No. 79, folio 82.

1670. *July* 16. My LORD RAMSAY and his CHILDREN *against* The EARL of WIGTON.

THIS was a pursuit at my Lord's instance, as tutor and administrator of the law to his children, and at their instances as nearest of kin to the deceased Sir William Fleiming who died at London, against the Earl, as he who has intromitted with the said Sir William his moveable estate in England; for making count, reckoning, and payment to them of the same, as being nearest of kin.

The *first* DEFENCE was, ye have no interest to crave this count unless you can show a right of administration in your person. ANSWERED, Ought to be repelled, because the Earl, defender, has obtained the administration already from the Prerogative Court in England, and so must be countable.

The *second* was, They offered them to prove that Sir William, by a nuncupative testament, did nominate the defender his sole executor; which is valid by the law of England, and must be sustained for giving him interest in the English estate; and this they offered to prove by witnesses. This was FOUND RELEVANT.

Then *3tio*, *Esto*, he were the person who has procured *jus executionis et administrationis*, then it is offered to be proven, by the custom and law of England, that an administration is such a title as it makes him noway countable, neither to the nearest of kin nor any others; and so he must be assoilyied from this pursuit. This was found relevant to be proven by the Judges of that Court, and a commission was granted to that effect.

Act. Wallace and Leirmont. *Alt.* Lockhart.

Advocates' MS. No. 80, *folio* 82.

1670. *July* 16. The LAIRD of Chesters *against* KER of Lintoun.

IN this action an apprising being quarrelled as null, on this reason, that it was deduced on an heritable security bearing requisition, and that no requisition was made: to this it was ANSWERED, That they offered to prove required.

REPLIED, Their requisition cannot be respected, because past from, in so far as he took annualrent for terms after the requisition, which made the security (made moveable by the requisition) return again to its own nature.

DUPLIED, The taking of annualrent made not the sum heritable again, because the contract bearing an obligement on the debtor for payment of annualrent to the creditor as well not infeft as infeft, any annualrent he took after the requisition, it was by virtue of the personal obligement; and he does not ascribe it to his infeftment. *2do*, He has homologated the apprising in so far as he has accepted or received discharges of the rents of the land relative to this apprising.

Vide supra, No. 29, [21*st June*, 1670,] *in fine.*

Act. Lockhart and Pringle. *Alt.* Sinclair.

Advocates' MS. No. 81, *folio* 82.

1670. *July* 19. The BISHOP of ARGYLE *against* WALKER.

THIS was an action against the defender to have him deprived from being commissary, for his malversation in the place; and his utter insufficiency to exerce the same, having neither law nor Latin.

Act. Thoirs. *Alt.* Lockhart.

Advocates' MS. No. 82, *folio* 82.

1670. *July* 20.

THIS was a reduction, whereof the terms were run: and the pursuer seeking certification, it was ALLEGED, There could be no certification granted, because they had made a sufficient production, *viz.* of all such writs against which any special reason was libelled.

ANSWERED, Ought to be repelled, because the pursuer having called both for seasines and dispositions which were the grounds and warrands of these seasines, there are nothing produced but the seasines.

REPLIED, That the defender was content to declare that if the pursuer should reduce the seasines, that then the grounds and warrants thereof craved to be produced should fall *in consequentiam.*

DUPLIED, *Non relevat,* because if the dispositions were produced he would find such qualifications and conditions therein as would much further his cause, and therefore they must be produced.

TRIPLIED, There is nothing libelled upon such qualifications, and therefore the duply must be repelled.

The defender's declaration seems reasonable.

Act. Sinclar. *Alt.* Lockhart.

Advocates' MS. No. 83, *folio* 82.

1670. *July* 20. PORTERFEILD of that Ilk *against* BELSCHES of Tofts.

THIS was an action for mails and duties of lands: against which it was alleged, that Tofts had a declarator of property of thir lands against the pursuer and others depending, which being heard in the Inner House sundry persons were appointed to be examined thereupon. The same is altogether prejudicial to this action, and this must cease till the declarator be discust.

The Lords DECERN in the mails and duties; superseding extract till the 1st of December, betwixt and which time Tofts may insist in his declarator.

2 *Advocates' MS. No.* 84, *folio* 83.

1670. *July* 20. The DUKE of BUCCLEUCH *against* SCOTS and OTHERS.

A GLEBE having been designed out of the Duke of Buccleuch his lands within the paroshin of Hassinden, to the minister at that kirk, the Duke he raises a summons against the rest of the heritors of the parish for relieving him of their proportions of the glebe, conform to the act of Parliament, Ja. VI. Parl. 14, act 199.

Against which it was ALLEGED, That though the summons was founded upon the act of Parliament, yet that it subsumed not in the express terms thereof, which bears that relief shall be only due of the other heritors where the haill paroshin, or a great part thereof, are kirk-lands; but so it is, it is neither subsumed, nor can be subsumed, that the haill paroshin of Hassinden, or a great part thereof, are kirk-lands; yea to the contrary, among all thir defenders called, there will not be ten acres of kirk-lands. To which it was ANSWERED, That the great reason of that act of Parliament being, that there was no more reason why the minister's glebe should be designed out of my kirk-lands than another's in the parish, therefore the law allows relief, yea, if there be not sufficient kirk-lands in the parish to complete to the minister four acres for a glebe, then it must be designed to him out of the nearest temporal lands of the parish, and the reason is the same whatever the kirk-lands in the parish be, many or few; and as for the act of Parliament, whatever the conception of it may be, yet a long contrary consuetude has derogated thereto.

The Lords FOUND this derogation relevant.

2do, ALLEGED, By the acts of Parliament anent manses and glebes, *vix.* Ja. VI. Par. 3, Cap. 48; and Parl. 13, Cap. 161, it is appointed that ministers' glebes be first designed out of abbot's lands, then friar's, then vicar's, then any other kirk-lands; but so it is, it is offered to be proven there are abbot's and friar's lands in the parish, the possessors of which lands must be first liable in relief. ANSWERED, *Nullo modo relevat*, unless he condescend upon these abbot lands, and who possesses them.

The Lords FOUND he behoved to condescend.

Act. Lermonth. *Alt.* Pringle and Eleis.

Advocates' MS. No. 85, *folio* 83.

1670. *July* 21. THOMAS SOMERVELL, Tailor, *against* His DEBTORS.

IN this process, Stainbyres among others being convened for payment of a count contracted by him in his father's lifetime, at which time he was but a minor, and the same being referred to his oath; ALLEGED, 1*mo*, he was minor, and so could not depone. ANSWERED, That it is not relevant unless he say he is a pupil within the years of tutory. 2*do*, That this count being for things furnished to him when he was but an infant, he was noway capable to depone thereon.

This was FOUND RELEVANT.

Act. Falconer. *Alt.* Lockhart.

Advocates' MS. No. 86, *folio* 83.

1670. *July* 21. ——— *against* ———

A DECREET being ALLEGED to be intrinsically null, because it was given the time of vacance without a dispensation; it was ANSWERED, the decreet was good notwithstanding of that defect, because it was a decreet *in foro* given, the defender compearing therein, and proponing other objections, and noways objecting that; by which compearance he *tacite* past from these dilators.

This answer was FOUND RELEVANT; albeit it was replied, that a dispensation was *pars judicis*, and a thing the parties had no interest to take notice to.

Act. Falconer. *Alt.* Dinmuire.

Advocates' MS. No. 87, *folio* 83.

1670. *July* 21. Anent REFERENCES to OATH.

IT was QUESTIONED if, as where any thing is referred to a person's oath, and a term is assigned for producing of him, and he dies before the day assigned to him for his compearance to depone, the thing referred to his oath will not be holden as proven, but he must prove it otherways? If likewise he die after the day of compearance but before the term is circumduced, *quid juris?* It may be thought that *dies interpellat pro homine*, and he not compearing at the day assigned to him for that effect, he is *in mora*, and so the points to be proven must be holden as confest by him; yet it seems more consonant to law that they nowise be esteemed proven till an act be extracted and the term circumduced, seeing all acts assigning terms bear with continuation of days, &c.

Advocates' MS. No. 88, *folio* 83.

1670. *July* 22. FRANCIS ARNEILL *against* WILLIAM BROWN, Agent.

THIS was a declarator of a gift of *ultimus hæres*, together with an improbation of sundry evidents *super hoc titulo* as donatar to the *ultimus hæres* of

ALLEGED against the declarator, no process, because not tabled. This was found relevant.

ALLEGED against the improbation; that he can never be heard to insist therein till such time as his gift be declared; seeing a naked gift, without a declarator, can never be a title nor interest whereon an improbation can be pursued. The pursuers ALLEGED in the contrary.

The Lords were contented to give them the Lords' answer thereon.

Act. *Alt.* Eleis.

Advocates' MS. No. 89, *folio* 83.

1670. *July* 22. JOHN FORRESTER *against* BROWNLIE.

THIS was a declarator of an order of redemption used, of two sundry wadsets of one tenement. ALLEGED, the order cannot be declared; because, 1*mo*, The instrument bears no numeration to have been made of the money as it should have done, but only that he was there with a bag ready to pay the money, in which bag there might have been only slate stones, and so it is null. 2*do*, That order can never be sustained, because the terms and tenor of the reversion were not kept, in so far as it was provided by the letter of reversion that the order should be used at Whitsunday 1668, and yet the same was not used till the Whitsunday thereafter; whereas reversions are *strictissimi juris et præcisa earum forma est servanda.*

ANSWERED to this; that *esto* he did not keep the precise tenor of the reversion, yet that can never take away from him his lands, or right of reversion called in law *jus de retrovendendo;* seeing its strictness is not so great unless there had been a clause irritant declaring that, if the order were not used at such a term, the reversion should expire, which was not here.

They were to have the Lords' answer on this, whether or no a party that had neglected to use the order of redemption conform to the words of the reversion, may yet use the same, yea or no.*

Then 3*tio*, ALLEGED, the order is null; because, it being declared by the reversion that it should not be lawful to the granter of the wadset to redeem, till such time as he paid also all the expenses waired by the wadsetter haver on reparation of houses, &c. which expenses being given up in count at the pretended order, he refused to allow the same, and so the order is null. 4*to*, Though the money was consigned at the time of the order, yet the same being uplifted shortly after, the defender must be freed of the annualrent of the same since the consignation, and the pursuer must be liable therein.

The Lords found this last relevant.

Act. Trotter. *Alt.* Wallace and Seaton.

Advocates' MS. No. 90, *folio* 83.

1670. *July* 22. GIBSONE, Brother to DURIE, *against* HALIBURTON of Innerleith.

THIS was a charge upon a bond granted by the defender to Mr. James Reid, and assigned to the charger by him; which was suspended, 1*mo*, Because the time of the granting thereof he was a minor, having curators, and he gave the bond without their consent. ANSWERED, Ought to be repelled, in respect the bond is not only subscribed by himself but by two of his curators, which makes a *quorum.* REPLIED, That will not fortify the bond, because by his act of curatory three are appointed only to be a quorum.

He is ORDAINED to produce the act of curatory before answer.

The *second* reason of suspension, (and he had also a reduction on that same

* This order was found by the Lords lawful.

reason,) was lesion by granting that bond. ANSWERED, He can never pretend lesion, because it is offered to be proven that this debt was a debt owing by his father, (to whom he was heir,) and that there was a decreet recovered against him at the cedent's instance, for payment of that debt as representing his father. REPLIED, That decreet can prove nothing, because discharged by the cedent. DUPLIED, Cannot be heard, because if any such discharge be, the same was granted in contemplation of this bond now charged upon; and this I offer me to prove by the suspender, and those who were at that time his curators, their oaths. TRIPLIED, *Nullo modo relevat* by his curators' oaths to his prejudice; neither will he suffer them to depone.

They were to have the Lords' answer upon this if his curators should depone, yea or no.

Act. Dewar. *Alt. Suspender,* Spotswood.

Advocates' MS. No. 91, *folio* 84.

1670. *July* 23. MR. JAMES M'GILL *against* WATSONE.

THIS M'Gill having been minister at Largo in 1655, and having waired L.700 upon the reparation of his manse, there was a stent imposed, for reimbursement of thir expenses, upon the haill heritors of the parish, conform to the act of Parliament; and this defender refusing to pay his proportion thereof, viz. L.19, he was convened before the Sheriff of Fife to pay it, and decreet was there recovered against him; which decreet was suspended on this reason, that though the acts of Parliament allowed only a manse worth L.1000, yet that this charger had repaired and made the manse worth L.2000; and that the suspender was not cited to the imposing of that stent, as he should have been; and that neither at that time, nor for many years thereafter, he had no interest in that parish; and so this stent not being *debitum fundi* can never be sought of him, but the minister must have his relief of the then possessors of the land.

Thir reasons were repelled, because there was no reduction of the decreet; neither would they supersede extract till the reduction should be ready, but reserved it as accords.

Act. Suspender, Trotter. *Alt.* ———.

Advocates' MS. No. 93, *folio* 84.

1670. *July* 23. ALEXANDER HAY *against* ALEXANDER HOME, Tailor.

HOME and his spouse having granted bond to Janet Geddes, kail-seller in Edinburgh; Home, two days before Janet her decease, *viis et modis* gets the bond; and being now pursued by Hay, who, as sister-son to Janet, is her executor, to pay that sum contained in the bond; he defends, that though he was once debtro to Janet in that sum, and for that effect granted this bond; yet the same being

now in his possession and custody, *de jure* the same is reputed retired and satisfied. To which it was ANSWERED, That the rule of law *instrumentum apud debitorem repertum inducit liberationem debiti*, at the most infers only presumptive payment, and being but *presumptio juris*, may be elided and taken away by contrary and more pregnant presumptions, such as they have here, viz. that it was seen two days before Janet's death in her own custody; that it is not presumable it was given up upon payment made to herself, she lying then on her death-bed, and having no use for money; as also *donatio non presumitur*; and they offer them to prove by the defender's oath, that though he have now his own bond, yet that he paid no sums of money therefore, but that since he got it he offered to treat and pay a part of it, if the pursuer would be content. REPLIED, *Nullo modo relevat* that he paid nothing for it, for he might have had it *ex donatione*, and as for his offer that was only *litis redimendæ causa*.

They were to have the Lords' answer on it whether or no the defender would be holden to depone in the manner the pursuer craved.

Act. M'Kenzie and Seaton. *Alt.* Lockhart, Eleis, Murray, &c.

Advocates' MS. No. 94, *folio* 84.

1670. *July* 23. WALTER EWING *against* SIR WALTER SEATON.

THE letters being found orderly proceeded in a suspension, and the charger seeking the penalty of the bond in respect he had got two decreets in the matter, and was forced to come from London to prosecute it. ANSWERED, There is no penalty incurred but where the debtor is *in mora* to pay; but here there was no *mora*, seeing the suspender had a good reason of suspension, viz. that he being only a cautioner he was *in bona fide* to suspend, in regard the principal had suspended for that same debt; and so he was not *in tuto* to pay.

They were to have the Lords' answer on this.

Act. Suspender Cunyghame. *Alt.* Lermonth.

Advocates' MS. No. 95, *folio* 84.

1670. *July* 26. LADY BUCHANAN *against* The LAIRD of ROSSYTH.

THIS was an action for payment of *ipsa corpora*, of the teinds intromitted with by him, and those whom he represents, during the space of sundry years libelled; AGAINST which it was ALLEGED, That thir teinds acclaimed, being only *decimæ minores, viz.* vicarage teinds, the same must be regulated *secundum consuetudinem et usum loci*; but they offer them to prove that they have been in possession of thir teinds, free of tacks, past memory of man, for payment of 40 merks by year, as the rental taxation of the said vicarage, and therefore *ipsa corpora et specics* cannot be now sought, seeing they have prescribed *immunitus* therefrom; for

though by the canon law no prescription can run *in decimis garbalibus*, yet *decimæ minores* may be prescribed.

The Lords found this allegeance relevant.

Act. Birny. *Alt.* Cunyghame and Stewart.

Advocates' MS. No. 96, *folio* 84.

1670. *July* 9, and 27. The MAGISTRATES of Montrose *against* SCOTS.

July 9.—The magistrates having by sworn stent masters stented the whole town, and amongst other inhabitants thereof, having stented thir defenders, conform to their estate and the quality of their trade; and having charged them to pay their proportions, they suspend upon this reason, that there was a prior stent imposed upon the citizens of that burgh, and upon them amongst the rest, for this same very ground and cause for which this stent is again laid on; which first stent was accordingly levied and paid; and this they offered to prove by the stent rolls, and the treasurers their receipts of that stent. This was found relevant. A second reason was the inequality or partiality used in imposing the stent, in so far as thir suspenders are stented three times higher then they were four years ago.

ANSWERED,—*Non relevat* to infer any inequality, seeing the increase of their trade has given occasion to that, which trade is a thing uncertain, sometimes better, and sometimes worse. And where they REPLIED, that trade was universally now decayed and turned worse in the kingdom; it was DUPLIED, that *in toto jure generi derogatur per speciem*, and whatever general decay there may be of trade there or elsewhere, yet they offer them to prove, that their trade is far greater now than it was then, when they were stented at less. But *2do*, it ought not to be permitted to burghers, for a small inequality, to quarrel the stent imposed by sworn men, else all the magistrates of our royal burghs might be sore troubled, and the taxation should come but slowly in.

Charger, Lockhart. *Alt.* Sinclair and Bailie.

Advocates' MS. No. 70, *folio* 81.

July 27.—In this cause, mentioned before, *9th of July* 1670, they having alleged on a former stent, and it being admitted to their probation this day, the term being craved to be circumduced against them, they produced a diligence against the keepers of the town books for proving it, and craved a farther diligence. ALLEGED, They could have no farther diligence, because they being in a suspension, could have no more terms for proving their reason save one. REPLIED, Ought to be repelled, because, *1mo*, it is but a charge on general letters; *2do*, offers to prove the chargers hindered the stent-masters from producing their books, and so it is through their own default that their reason is not proven.

The Lords granted a farther diligence. *Partibus ut supra.*

Advocates' MS. No. 97, *folio* 85.

1670. *July* 27. MR. JAMES MIRK *against* M'CORCADELL.

MIRK having married [illegible] daughter on this defender; and having, among other obligements, engaged himself to pay 7,000 merks in name of tocher, raises a reduction of this contract, on this reason, that he must be liberated from any performance of such obligements as are upon his part, in regard the other party, his son-in-law, not only has not performed his part, but is altogether unable to perform any part thereof, he not being *solvendo* for a sixpence; and yet made him believe that his brother, a Laird in the Highlands, had subscribed the contract; whereas there was no such thing; and he has since improven the subscription. ANSWERED,—His not fulfilling not *relevat*, because ye have an action whereby ye may pursue him for implement.

The Lords inclined much to repel the reason of reduction.

Act. Spotswood. *Alt.* Trotter.

Advocates' MS. No. 98, *folio* 85.

Vide infra, June, 1677, *No.* 579, § 6.

1670. *July* 27. Anent *JUS MARITI.*

IN the case betwixt ——— and ———, it was alleged, the husband was nothing but a legal administrator of the goods belonging to his wife, though such as can not be called to an account during the standing of the marriage; and that the *jus mariti* (conform to the 32d act in 1661) carries not with it a right to heritable sums due to the wife, except only *quoad* the annualrent thereof.

Partibus, Cunyghame and Birnie.

Advocates' MS. No. 99, *folio* 85.

1670. *July* 29. LORD RUTHERFORD *against* JOHN RUTHERFORD.

I hear there is an improbation raised at my Lord Rutherford's instance, against one John Rutherford, a servant of his umquhile brother's, and one who intromitted with his estate divers years, of some bonds granted to the said John by the deceased Lord Rutherford, amounting near to L.2000 Sterling, with a general discharge of my Lord's, of all he could charge him with, and an assignation to sundry debts due to my Lord. The reasons against the assignation are, 1*mo*, Offers to prove, my Lord was lying in the abbey sick that day, whereon the said assignation is forged to have been subscribed; and yet it bears subscribed at London: so this reason is an *alibi*, and for adminicling the same, they adduce James Borthwick's account book, bearing that a potion of physic was administered to my Lord that day, he lying in the abbey. 2*do*, There's one Brown (designed in the assignation indweller in Lauder,) who is writer thereof, and also subscribes as a witness, there was never such a man neither dead nor living; or if they can adduce any such man, then they offer to prove that's not his hand write. *Vide infra,* [Historical volume,] thir persons hanged.

Advocates' MS. No. 101, *folio* 85.

1671. *January* 10.

THE Advocates at last having boated on the 10th of January, 1671, they having made a secession for some weeks because of the regulations, we return to our former observes.

Advocates' MS. folio 85.

1671. *January* 12. ROW *against* COUPAR.

THIS Row being in Galloway, and hearing that this defender was going for Edinburgh, he desires him to take in with him a horse to Peter Mell, and deliver it to him, which he accordingly did, but the horse within very few days after died. Coupar being pursued for the price of the horse, in regard it died by his default, he having jaded and spoiled it by the way; whereas, conform to the trust reposed in him, he should have delivered it as sound as when he received it. His defence was, he being *nudus negotiorum gestor*, he could not be liable for any accidents that befel the horse, after he was out of his possession, and consequently not for his death, that being *casus fortuitus* which *in nullo contractu præstatur*; and that he had the internal sickness on him, whereof after he died, before he was delivered to him, he proved by a testificate of a ferrier who saw the horse before that time.

Act. ———— *Alt.* M'Kenzie, elder.

Advocates' MS. No. 103, *folio* 85.

1671. *January* 12. FUTT *against* LORD RUTHVEN.

THIS was a pursuit for count and reckoning, at a tenant's instance against his master; wherein, 1*mo*, the penalty of a tack set by my Lord to him being craved, in regard my Lord had set these very same acres to another; it was REPLIED, He could not be heard to crave that failyie now, because the tack was now expired, and he had ever paid him the tack duty without any reservation or reclaiming against the same.

It went to interlocutor whether this was a passing from the failyie or no. I think it was.

2*do*, He CRAVED defalcation of acres, in regard by inundation they were taken away from him, and *alluvione* were adjected to my Lord's lands on the other side; so that he reaped the benefit thereof, by shearing the grass and mowing the hay that grew thereon.

My Lord Castlehill found an inundation only not relevant, unless it had been such as had occasioned a total sterility, *l.* 15, *p.* 2 *and* 3, *D. locati*: but for the last part anent the alluvion, he sustained it relevant.

Act ———. *Alt.* Spotswood. *Advocates' MS. No,* 104, *folio* 85.

1671. *January* 13. TOD and JOHNSTON *against* my LORD DRUMLANRICK.

MY Lord having ejected thir persons by virtue of a decreet of removing, they intent reduction of that decreet upon this reason, that my Lord had no right to these lands standing in his person, but the naked superiority. Answered,—He had got an resignation *ad perpetuam remanentiam* from the last vassal of these lands, and so the property and superiority were confounded, and both concentred in his person.

REPLIED,—This resignation cannot be respected, because, before it, the pursuers having charged Drumlanrick superior to enter them to the lands, as having right thereto by disposition, precepts were direct out of the chancellary, upon his disobedience, to the Sheriff for infefting them, and they were accordingly infeft before the resignation.

DUPLIED,—The precepts and the seasine are null, in respect the charge given to my Lord was suspended before the seasine was given.

TRIPLIED,—Ought to be repelled, because the suspension was antedated, and though it bears date four days before by seasine, yet Walter Riddell and Hew Wallace the writer of it, being examined thereupon, they have both acknowledged that the bill was not so much as presented while after the date of the seasine.

Their dispositions were ordained to be advised.

Advocates' MS. No. 105, *folio* 85.

1670, and 1671. MAGNUS MOWAT *against* The TOWN of LITHGOW.

1670. *July* 22.—This was a spulyie which they restricted to vitious intromission; against which, alleged *absolvitor*, because any intromission the town had with the goods libelled, was by authority of an act of Parliament, *Ja.* 6, *Parl.* 12, *Cap.* 152: authorizing and empowering all burghs Royal, to search, apprehend, take, and intromit with the goods and geir of unfreemen traffickers within the bounds of their respective jurisdictions, and to apply the one half to their own use, and the other to the king's; for this pursuer being an unfreeman, yet keeping a common trade of staple commodities betwixt Holland and Borrowstowness, (which lies within Lithgow's territories,) they apprehended some soap pertaining to him; and so what they did, being done *optimo jure* they can never be liable therefore.

ANSWERED,—1*mo*, Where he is called an unfreeman, offers to prove he was a freeman in Kirkcaldie, Dundee, and sundry other free burghs, and so had power to trade in staple commodities. 2*do*, Where the town of Borrowstouness is said to be within the defenders' territories, the contrary is notour, it being a free regality erected to Duke Hamilton. 3*tio*, The defence is not conceived in the terms of the act of Parliament whereon it is founded; for it requires that the goods

which they are empowered to seize upon, be exposed to sale by unfreemen, which was not done by the pursuer, but were only imported there *ad exonerandum*, and to be sold in bulk to free men.

REPLIED,—The first *non relevat*, unless he say a freeman in Lithgow; else he had no right to sell or import staple wares within their bounds; and oppones the act of Parliament. To the *third*, oppones also the act upon which their defence is *in terminis* conceived and subsumed; and if it were otherwise, the burghs royal were in a very hard case.

They were to have the Lords' answer on it.

The Lords issued forth a commission to merchants, especially in the town of Edinburgh, to try what was the particular custom in such cases, where a man was burgess of one town, and offered to sell in gross to another burgh, if he was free to do the same or not, and if it fell under confiscation as free goods.

Act. Birnie. *Alt.* Wallace.

Advocates' MS. No. 92, *folio* 84.

July 29.—In this cause noted at *No.* 92, the dispute having gone to interlocutor, the Lords repelled the defenders their allegeance and duply, in respect of the pursuer his libel and reply; and therefore admitted the summons to his probation.

Advocates' MS. No. 100, *folio* 85.

1671. *January* 13.—The interlocutor we have at *No.* 100, being stopt, was this day heard again.

It was ALLEGED for the pursuer,—That his being freeman in Kirkaldie, made him free to import staple commodities to any place in Scotland, though he were not a burgess in that place, and therefore Lithgow did wrong in meddling with his soap.

To this it was ANSWERED,—That the same was altogether false; for as every burgh had their own particular jurisdiction, and had power therein to punish and fine delinquents and unfreemen; and as the magistrates of another burgh royal, cannot exact or uplift the fines imposed by the magistrates of any other burgh than their own; so the privilege of merchants in one burgh cannot *in communi* be extended to all other royal burghs in Scotland.

2*do*, It being ALLEGED that the town could never meddle therewith, because ye had not yet broke bulk thereon, nor exposed it to sale; ANSWERED,—We offer us to prove he had sold some of it ere we seized on it. *Partibus ut supra.**

Advocates' MS. No. 106, *folio* 86.

* *Hope, folio* 15, at the title about Burrow's privileges, tells of a charter given by King David to the Burrows, prohibiting them to buy or sell within one another's liberties; and so the being free in one, makes him not free in another, yet see *Leges Burgorum, capite* 139. *Vide infra, December* 1676, *town of Glasgow* against *Greenock, No.* 615.

1671. *January* 20. CASSE *against* CUNYGHAME.

THE son of Mr. Casse, Doctor in Divinity, being minor, and for tutors having Mr. John Smith and others, had an infeftment of annualrent to be uplifted out of the lands of Auchinharvie, which was judged expedient to be made over to any that would give a competent price for it; accordingly Mr. John Smith, as tutor, and as having a factory from all the rest, sells this right to doctor Cunyghame, who had taken course with all the other real rights that affected the said land. When Casse was major, he counts and reckons with Mr. John his tutor, who solely acted in his business, in regard of the factory he had from the rest, and approves of all he had done, and discharges him amply thereof. Notwithstanding whereof, within his years of twenty-five, he intents a summons of reduction of the disposition made by himself and his tutors to Sir Robert of that right, *ex capite minoritatis et læsionis*, and offers to refund the price received.

To this it was ANSWERED for Sir Robert,—That the pursuer can never be heard to quarrel that deed done in his minority, because he has ratified and homologated the same, in so far as he has counted and reckoned with Mr. John Smith, his tutor and factor, and has approven what he did, (now he did this amongst others,) and discharged him.

To this it was REPLIED,—That whatever discharge he has granted to his tutor, it can never debar him from quarrelling this defender; because, 1*mo*, it is *res inter alios acta*, and so a discharge to Mr. John Smith can never import a discharge to Sir Robert Cunyghame; 2*do*, Of the law the minor lesed, has two actions at his option;* one against his tutors for not doing his affairs profitably, and with the same diligence that a rational man uses in his own; another against the party with whom he contracted for rescinding the contract: now his discharging one of these two actions can never in reason cut him off from having recourse to the other, especially considering that the said discharge they obtrude, is clogged and burdened with qualities and protestations, that it may no way prejudge any other right or action he had competent to him in his person. To this it was answered, that though he had two several actions, yet they being both of one nature, and tending to the same, the passing from the one behoved to be an implicit passing from both; yet see 19*th February*, 1630, *Hilderston* contra *Maxwell*, and the case there. And as for the protestations, the same being *contrariæ facto*, they cannot be respected. It was likewise urged, that every lesion was not enough to restore a minor, but it behoved to be such a one as at first sight incurred in any rational man's sense, *vide l.* 4, *D. de in integrum restitutionibus*. As for acts of homologation, see *Mr. David Thoires, his case* against *Sir A. Ramsay*, with the practiques of *Rires* contra *Rires*, *Young and Barnes*, and others cited therein.

Advocates' MS. No. 107, *folio* 86.

* That the minor has the election of any of thir two remedies, even the one after the other, is clear by Maximinian's and Diocletian's laws, in *l.* 3, *and* 5, *ibique Cujacium in paratitlo, C. Si tutor vel curator intervenerit:* and the personal action against the tutors and curators lasts after the time allowed for seeking restitution; *ita Antoninus in l.* 1, *dicto titulo.*

1671. *January* 26. CARSE *against* CUNYGHAME.

IN this action the Lords FOUND, That albeit the genuine and natural action that flows from an infeftment of annualrent, is a poinding of the ground, and a decreet for the same; yet that an annualrenter might compear in a process for mails and duties pursued at the instance of other creditors, and be admitted for his interest, and take forth a decreet for mails and duties against the same tenants.

In this same cause, they ordained doctor Cunyghame to count and reckon with the pursuer, anent his intromission with the rent of the lands acquired; and that being done, they would give their answer upon all.

This was thought favourable for Carse, for what he has meddled with over and above the annualrent of the money, (which was L.26,000,) these fourteen years in the mails of these lands, it is feared he be ordained to refund it.

Advocates' MS. No. 109, *folio* 86.

1671. *January* 26. GRAHAM *against* SIR JAMES MURRAY of Skirling.

IN anno 1652, my Lord Panmuire comprises Sir James Murraye's estate for certain sums of money. Before the deducing of this comprising Sir James had granted a wadset right of the lands of Skirling, for a certain sum, to one Leviston; which right was afterwards acquired by his brother Sir Robert, and transferred over by him to his nephew James. My Lord Panmuire dispones the grounds whereon the apprising was led, to his son Harie Mauld. Harie makes it, with all the rest of his estate, over to his lady, now married to Douglas of Gogar. She assigns and dispones it to this Grahame, who, as having right by progress to the apprising, had also right to the reversion of that wadset given to Leviston; and upon this progress uses an order of redemption, and pursues a declarator of his order.

Against which it was ALLEGED, 1*mo*, That all parties having interest were not called, *viz.* my Lord Panmuire. 2*do*, Harie Mauld's right can never be found valid to sustain this order, it being only a clause of substitution, making that sum contained in Sir James Murraye's bond payable to Harie, after the decease of the Earl his father: now his father, in his own lifetime, led the comprising in his own name, and never made any disposition of it to Harie; and what way can Harie, or any deriving right from him, pursue a declarator on this apprising, to which he can show no right in his person. 3*tio*, The bond wherein Harie was substitute, bears an express power to the father to uplift the same, to discharge it, dispose of it, or alter it at his pleasure, any time in his lifetime; but *ita est* this comprising must be repute an innovation of the same, *hoc maxime attento* that he apprised the lands to himself, and his heirs whatsomever, which is a most evident revocation of the substitution; and so the right of the apprising must be in my Lord Panmuir's person as heir.

To this it was ANSWERED,—That Harie having right to the sum by virtue of the clause of substitution in the bond, he behoved of all necessity to have right to all that had followed thereupon, since the bond, and the diligence done thereon keep the same channel, and cannot in law be divided, *ubi accessorium sequitur suum principale;* and Harie needed no other thing to give him right to the apprising, but the clause of substitution conceived in his favours: and the leading the apprising after the bond, and the Earl's taking the infeftment to himself and his heirs whatsomever, must be repute, no change of the substitution, nor exercise of that power reserved him by the bond, but must be ruled by it as relative thereto; and to propone upon the Earl's right as heir, is not competent unless he were compearing.

It was REPLIED,—That Harie and those who have succeeded in his right, should have raised a declarator of their right to the apprising, as consequential to the bond, ere they could use any order of redemption by virtue thereof.

They were to have the Lords answer upon both these points. See a case not much unlike, 26*th July*, 1610, *Douglas of Cavers* contra *Elliot*.

Act. Lockhart. *Alt.* Wallace. *Advocates' MS. No.* 110, *folio* 86.

1671. *January* 27. MACKEINZIE *against* MACKEINZIE.

THIS is a reduction of a decreet of the commission for plantation of kirks, at a minister's instance, against his parishioners. My Lord Advocate refused to find the Lords Judges competent to the reduction of the plats decreets, because it is a committee of Parliament, and at least co-ordinate to the Lords themselves. But it being called before my Lord Gosford, he SUSTAINED it, seeing the Lords are not obliged to decline themselves. *(Vide infra, June* 1677, *Number* 586, *Minister of Nig's case.)* And this were very acceptable to the lieges, if it were drawn in a custom, because they get far more speedy justice before the Lords of Session, than they do before that commission. See something not unlike sustained in the English time, 11*th June* 1656, *Earl of Roxburgh*. Yet see 6*th February* 1658, *Mr. Robert Hodge;* but at this time there was no such court as a commission.

Act. Rory Mackenzie. *Alt.* Sir G. Mackenzie.

Advocates' MS. No. 111, *folio* 87.

1671. *January* 27. GEORGE GORDON *against* REIDS.

THIS was a reduction, at the instance of Mr. George Gordon, son to George Gordon, messenger, against thir Reids, of a disposition made by his father to them on death-bed. Against which it was ALLEGED,—That he had no interest to pursue this action, because he wanted an active title; *viz.* he was not served and retoured heir. ANSWERED,—He had a service, and that was enough. REPLIED, It was never heard of, that a service (which is only a passive title without a re-

tour) could found a pursuit. DUPLIED,—He insisted as apparent heir, and cited my Lord Balmerino's case against Airlie, wherein they found not only that an apparand heir might reduce a deed done to his prejudice *ex capite lecti*, but even a personal creditor.

My Lord Gosford demurred on this: for *Durie* 11*th February* 1635, *Muire*, seems to be contrary.

Act. Cunyghame. *Alt.* Yeoman.

Advocates' MS. No. 112, *folio* 87.

1671. *January* 27. GORDON of CLUNY *against* ———

THIS was a charge upon a contract; against which it was ALLEGED,—That the charge was null, because the contract was summarily registrate after the death of one of the parties contractors, whereas it should have been registrate by way of action; for the registration of a writ is a formal decreet; now a decreet can never be obtained at a dead man's instance, nor yet against one that's dead. 2*do*, The clause of registration giving warrant to such a person to compear and give his assent to the registration thereof, is of the nature of a mandate; but *mandatum expirat tam morte mandatoris quam mandatarii.*

And this the Lords found in the Inner-house, in the case of *Kylle and Seaton*; See a case not unlike, 18*th July* 1610, *Gordon and Mackie.*

Act. Nicolsone. *Alt.* Seaton.

Advocates' MS. No. 113, *folio* 87.

1671. *January* 27. BISHOP of CAITHNESS *against* ANGUS MACKY of Bighouse.

THIS is a suspension upon this reason, that whatsoever bonds are granted *ob causam datam causa non secuta*, the same are null by way of exception; but *ita est* this bond charged on is such in so far as he granted it in contemplation of a tack of teinds which the Bishop was to set him, and which is never yet done; and that this was the cause of the bonds, refers it to the charger's oath.

This was FOUND RELEVANT.

Act. Thoires. *Alt.* ———. *Advocates' MS. No.* 114, *folio* 87.

1671. *January* 27. Anent VALIDITY of a TICKET.

THIS was a suspension upon this reason, that the ticket charged on is null, because it wanted the writer's name. It was ANSWERED, that it was all written with the suspender's own hand, and so they condescended on him as the writer of it.

This answer was SUSTAINED. *Second* reason is, that it was to put out of horse in the 1648 which he never did, and so it was *causa data*. This was sustained.

Act. Hamiltone. *Advocates' MS. folio* 87.

1671. *January* 28. GIBSONE *against* LAURIE.

THIS being a controversy betwixt thir parties about a piece land, Laurie intented a declarator of his right to the same before the Sheriff of Dumfries; in this action they are settled by friends, that Gibsone should consent to a decreet of dedeclarator, and Laurie should pay him for his right he had in that land 1600 merks. Accordingly he compears, and, (as the decreet bore,) specially consented thereto. Then Laurie raises a summons for the mails and duties of that land before the Lords; and having obtained decreet, charged Gibsone thereon; who suspended upon obedience. Of thir two decreets Gibsone intents reduction; and when they obtrude the pregnant and strong homologations aforesaid, viz. that he consented to the decreet of declarator and raised suspension upon obedience, so that he can never be heard to come against that now.

To this it was ANSWERED, That with the clerk's leave the assertion of a clerk can never bind consent upon Gibsone unless they can show where he gave them warrant to insert that consent in their decreet under his hand; and truly it were of very dangerous consequence if such a clause cast in only by the by were sustained as sufficient to deprive any of their rights or heritage, seeing *quod meum est sine facto meo ad alium transferri non potest L.* 11. *D. De regulis Juris:* but here there is no *factum* on Gibsone's part. *Item*, The Lords found the clerk's assertion not enough in L. Colonel Osburne's case; Durie also has a case somewhat coincident *25th January*, 1635, *Bell* and the *Lady Mow.** (See *Stair's Decisions*, 16 *July*, 1661, *Osburne*. See *27th July*, 1678.) Next the consent was but given by his procurator, whereas to make it relevant it should have been interposed by himself. As for the suspension, all that it can import is, that being altogether ignorant of the law, and such as could not get caution, and being most desirous to have a suspension, he thought this the most clear and the most easy way to get the same by offering obedience; but he noways meant the same, but allenarly this, that in case after the discussing of all his reasons the Lords should find the letters orderly proceeded against him, that then he should give obedience.

They were to have the Lords' answer upon both.

Vide 9th February, 1609, *Clerk*. *Vide infra*, 31*st January*, 1671, *Blair*, and *Papon* there cited.

Act. Wallace. *Alt.* Lockhart.

Advocates' MS. No. 115, *folio* 87.

* *Vide No.* 236, [*Louthain, &c. against Presbytery of Edinburgh, 4th Nov.* 1671.] Amongst the Romans and since, great confidence was reposed in clerks and such public persons, but piece and piece that trust has much diminished.

1671. *January* 28. Anent *pari passu* preference of APPRISINGS.

IT went to interlocutor, whether or no the third compriser, who has comprised within year and day of the second, but not of the first effectual comprising, will come in *pari passu* with the second as the second comes in *pari passu* with the first, conform to the act of Parliament? Though there may seem the same parity of reason, yet I think he will not. It may also be questioned from what time the year begins to run, whether from the date of the decreet of apprising, or of the infeftment rather, since it can scarce be called an effectual comprising till then; and so if a man shall have the benefit of the act of Parliament, who comprises within year and day from the date of the seasine, or if it must be from the date of the decreet, or of the allowance, as is found in a like case, 11*th November*, 1630, *Laird of Limpitlaw*. *Item*, it seems that if the denunciation of the second appriser be within year and day, it will be sufficient though the rest of it be without the year; for in *favorabilibus* (such as is the case of creditors contending *damno vitando*) *actio incæpta habetur pro completa, et initium est spectandum*. *Vide infra, No.* 196.

Advocates' MS. No. 116, *folio* 87.

1671. *January* 31. WHYTHEAD *against* THOMAS LIDDERDAILL.

IT was alleged that he could not answer till he was of new summoned, because any citation given against him was upon sixty days at the pier and shore of Leith, &c. as use is, against one that is out of the country; whereas he neither at that time, nor ever since, nor before, was he out of the country. ANSWERED, Let it be so, a citation as if he had been out of the country is more than a citation at one's dwelling house, and at least it must be repute equivalent to the same. *Quæ superabundant non nocent. In majori continetur et minus.*

My Lord Gosford would not sustain the citation, but found he must be summoned of new. The cause of this mistake was, that this defender had a brother who was truly out of the country, and who was also called in the process, and they thought it one work to cite both on the sixty days. See a case somewhat parallel, 4th June, 1631, *Chrystie* against *Jack*.

Advocates' MS. No. 117, *folio* 87.

1671. *January* 31. TAILFER *against* ———.

THIS was a suspension upon the reason of payment verified by a discharge produced, which bore only the receipt of L.40 in part of a greater due to the giver of the discharge. ALLEGED, The discharge did not meet this charge, and was not a discharge of any part of the sum contained in the bond charged on, though it be posterior to it, but of a decreet recovered by the charger against the sus-

pender of another sum. It was permitted to the creditor to ascribe the payment to what cause he pleased; for the discharge not bearing which of them it was in satisfaction of, *semper in duriorem causam imputabitur.*

L. 1. 2. *usque ad* 8. *D. de solutionibus. L.* 1. *C. eodem ibique* Vesembecius *et* Perezius. *Vide infra No.* 334. [*January*, 1672, *Aytoun* against *Lauder.*]

Solution is ay computed to cut off that debt which is *durior* to the debtor, *v. g.* he owes one sum on annualrent, another without it, indefinite payment will be ascribed to cut off the debt upon annual.

Advocates' MS. No. 118, *folio* 88.

1671. *January* 31. Anent COMPETENT and OMITTED.

ONE alleging exhausted, it was ANSWERED, That the said defence was competent to have been proponed before the commissaries, and being omitted there, it could not be received now *in secunda instantia.* REPLIED, That he could not propone it before the commissaries, because they nor no inferior Judge sustain this defence, exhausted by lawful sentences before the intention of your cause, unless they say obtained a decreet of exoneration, (though it be relevant before the Lords;) and why should he have proponed that which would have been repelled? DUPLIED, That having proponed it, and being repelled, he should have advocated upon that ground.

Vide Hope's Minor Practicks, Cap. 2. of confirmation of testaments; page apud me No. 13; *7th December*, 1609, *Aikman.*

Advocates' MS. No. 119, *folio* 88.

1671. *January* 31. BLAIR *against* BLAIR of Balgillo.

BALGILLO being debtor to the Laird of Denhead in a certain sum of money, he assigns it, in 1632, to Guthry of Coliston, who, in 1633, charges as assignee. This charge Balgillo suspends upon divers reasons, and debates it then with the assignee. The matter lies over; and, in the mean time, the assignation to Guthry perishes through the iniquity of the times. In 1648 Denhead makes a second assignation of it to Coliston, narrating, that where he had made him a former, and that the same was now lost, therefore he made him over a new right of the same. Coliston's assignee craving this bond and assignations to be transferred against this defender; it was ALLEGED, The same can never transfer, because the same was paid to Denhead the cedent, before the date of your assignation in 1648. To which it was REPLIED, That Denhead's discharge produced could never exoner him, but he behoved yet to make payment of it to the pursuer; unless he would say the discharge was anterior to his assignation or intimation of it *in anno* 1632. DUPLIED, He needed not say that, because *non constat* if there were such an assignation, seeing it now cannot be shown, *et de non apparentibus et non existentibus idem est*

judicium. TRIPLIED, He could never be heard to deny that assignation, seeing 1*mo*, The second assignation taken in 1648, proports the same to have been, and to have been lost. 2*do*, His reason of a suspension was a sufficient acknowledgment of the assignation which they produce, together with sundry minutes in a dispute that followed thereon in 1635. QUADRUPLIED, That the said assignation in 1648, and the raising of suspension in 1635, will be good adminicles for making up the said assignation in an action for proving the tenor of it; but that it should prejudge the debitor now when the same cannot be shown, is against all reason; for *esto* it were produced it might be null for many reasons; it might be so questionable that it would not be sustained for the ground of a pursuit or charge; or *dato* it had been a valid assignation, yet it might have been given back to the cedent, and he retrocessed.

They were to have the Lords' answer upon this. See something like in Papon's *arreists, Lib.* 10, *T.* 5, *des payments Cap.* 4*to.* where a man craving to be reponed against the discharge, and in the pursuit the discharge being found to be lost, the libel was found no acknowledgment of the acquittance. *Vide supra, 28th January,* 1671, *Gibsone.*

Advocates' MS. No. 120, *folio* 88.

1671. *February* 2. Anent SUMMONSES.

A SUMMONS must be executed within year and day after the same is raised, else that summons is null. Being executed, if year and day elapse without doing any thing thereon, the same is said to sleep, and we cannot insist upon it without it be again wakened; but a continuation of the summons, though ten years after the raising of the first summons, will be reputed equivalent to a wakening; as the Lords have oft found. *See Haddington, 13th December,* 1609, *Boig* against *Home.*

Advocates' MS. No. 121, *folio* 88.

1671. *February* 2. The EARL of ARGYLE *against* GEORGE CAMBELL.

THE Earl pursues the Sheriff, as having been chamberlain to his father the space of divers years, to count for his intromission with the rents of his lands.

Against which it was ALLEGED, That he could not count for his intromission these years, in respect he had a general discharge of the then Marquis, posterior to all the intromissions libelled, viz. *vide in anno* 1649, wherein this very pursuer is a witness.

To which it was REPLIED, That the sheriff was *in mala fide* to take a discharge of the then Marquis this pursuer's father, because before the same he was involved in sundry heinous, enormous, and atrocious acts of treason, for which

he was thereafter forfaulted *in anno* 1661; and so was incapable by the law to grant any discharge.

DUPLIED, The said acts of treason committed by him, for which thereafter he was forfaulted, being most latent and secret, neither could I, nor indeed was I obliged to know them, unless they had been notour to the whole country, as they were not; and thus was it determined in Regent Morton's case, who, sixteen years after the fact, being accused for the treasonable concealing of King Henry's murder, no dispositions nor other deeds whatsomever, made by him all that time before his accusation, were quarrelled, and of all necessity and reason it must be so, where the crimes are latent and not obvious to every man's capacity, as was in Morton's case; and so also here, else what a horrible uncertainty would men be put to, to know the most privy and close intrigues of those with whom they contract, or have otherwise to do, lest they be lying in the guilt of treason. *2do*, He can never pretend that his father could not then grant a valid discharge, as being *astrictus crimine læsæ majestatis*, because, by the decreet of forfaulture given against him, it appears that the main acts and crimes for which he was forfaulted were all committed by him after his granting the said discharge, viz. in 1654, in which he complied mightily with the usurper; for though in his criminal libel there were many other things accumulated against him which were perpetrated before the date of the said discharge, yet his compliance in 1654 was the thing the advocate then insisted only on, and he declared he restricted his summons thereto. *3tio*, *Craig page* 86, *in initio*, tells that payment may be lawfully made to one guilty of treason at any time before sentence, which he may also discharge; but *ita est* this discharge proceeded upon payment made to this pursuer's father of the rents of the lands intromitted with by him; *Ergo*, *vide infra*, *No.* 406. [*June*, 1673, *Dalzell* against *the Tenants of Caldwell.*]

The Earl also alleged, that notwithstanding of this discharge, the defender must count to him for some particulars of his intromission that he should pitch upon, because he offered him to prove by the defender's oath, that he had not counted for the same. To this it was ANSWERED, That the discharge behoved to liberate him from giving his oath anent any intromission with the granter's rents before the date of the same, and that it were a very dangerous thing if men were put to their oath where they sufficiently instruct by writ, especially considering that it is now twenty years and more since he counted, and gave up all his instructions to this pursuer's father, upon which exact account followed this discharge; and that *tanti temporis intervallum* produces in law probable oblivion, yea, the half of it suffices. Mascardius *de Probationibus conclus.* 1128.

REPLIED, The defender had no prejudice to give his oath, though it was *in facto antiquo*; because if he should depone *non memini*, whether I counted for such or such particulars, but for aught I know I did, this will assoilyie the defender, in regard his deposition proves not the pursuer's reply.

The Lords ordained the defender to depone.

This was my Lord President's doing, he being my Lord Argyle's great confidant. It was admired by all, that he blushed not to make a reply upon his father's forfaulture, and how he had committed many treasonable crimes before the discharge; and to see him, rather than tyne his cause, suffer his father to be reproached and demeaned as a traitor of new again by his own advocates.

L. 19. *D. de R. Juris unusquisque debet scire conditionem ejus, &c. See 6th December,* 1609, *Cunyghame and Home. See Balfour's Collection of Practiques, Tit.* 19 *of Payment, in principio, folio* 34. *Reo majestatis non recte solvit debitor, L.* 6. *C. ad L.* 3. *majestatis; L.* 41. *et seq. D. de solutionibus. See Hope, Tit. of treason, folio mihi* 246; *see Craig, page* 86, *No.* 446 *and* 479; *Connanus, libro* 5. *Commentariorum capite ultimo.*

Advocates' MS. No. 122, *folio* 88.

1671. *February* 2. THOMAS WATSONE, Merchant in Edinburgh, *against* JOHNSTONES of Coreheid.

IN this cause it was debated, whether a prorogation granted to a principal debtor will be profitable to a cautioner; and if such a prorogation will infer a novation so as simply to liberate the cautioner; and if a novation of the sum contained in a former bond may be also made use of by the cautioner in the same, though it seems not to be introduced in the cautioner's favours. *See* Mascardus *conclus.* 1113. *Vide etiam,* Schotanum *de constitut. Principum, page* 28, *de Rescriptis moratoriis* made in favours of the principal, but not of the cautioner. *Vide Notas D. van Tien super eo loco ibique Freundergerbium.*

Advocates' MS. No. 123, *folio* 89.

1671. *February* 1. LORD DUMFERMLING *against* the VASSALS of that Lordship.

HE having given in a bill to the Exchequer, desiring they might not enter any of the vassals of that Lordship, but that they might all pass by him, as having a three nineteen years tack of the whole casualties, obventions, and feu farms thereof; at least that they would enter none till they produced a certificate, under his hand, that he was satisfied anent their composition.

It was ALLEGED for the vassals, That the Earl's right was null, because of the law long tacks, such as this was, are equivalent to an alienation; and all alienations of the King's annexed property, and proper patrimony of the crown, are discharged by many acts of Parliament; but *ita est* the lordship and abbacy of Dumfermling is of the property annexed to the crown, though not by the general act 1587, yet by a posterior act in 1593 it is specially annexed, and it must also be supposed to be comprehended in the act of annexation 1633. 2*do,* The tack being granted in 1641, and his Majesty considering that many things had escaped both his own and his royal father's hands, during the time of these confusions, he has, in 1661, revoked all deeds done by him then: and though by a particular act in 1661 this tack be excepted from his Majesty's revocation, yet it must fall under the same, because, 1*mo,* The act *salvo,* according to its explication in 1633, reserves all parties interests as they were before the making of these

ratifications. *2do*, The explanation of the tack whereon my Lord Dumfermling lays the greatest stress is not ratified at all, and so it is undoubtedly revoked.

It was ANSWERED, to the first, that if the lordship of Dumfermling were indeed of the annexed property, the feuars and vassals would be so strongly founded on law, reason, and acts of Parliament, that it would not be easy to return them a solid answer; but that their case was nothing such: for that lordship belonged not to the King *jure publico seu coronæ*, but *jure privato proprio et jure successionis* as heir served and retoured to his mother, Queen Anne, in 1629, to whom it was disponed by King James, at Upslo, (upon Abbot Pitcairne's resignation in his hands) *per morganiticam*, and in a morning gift; which irredeemable disposition is confirmed in the same Parliament, wherein, through mistake, it is forsooth annexed to the crown, viz. in 1593; and she was thereupon infeft by charter and seasine, which are yet extant to show. Now, it falling to the King as heir, and being private patrimony, what power a baron or gentleman has, the King must have the same in disposing of it, setting it in tacks or otherways at his pleasure, *ita Craigius*, page 110. And it is expressly so ratified by the Parliament, 1612, *Act.* 10.

REPLIED, That the infeftment given to Queen Anne was undoubtedly a null infeftment; and if it had been quarrelled it could never have been sustained: and it having been produced and proponed on in the process pursued at the instance of my Lord Secretary, as Lord of the regality of Musselburgh, (which of old was a part of the Abbacy of Dumfermling,) against the feuars of Cousland, it was not found a valid right whereupon to defend: and whatever was in that the said lordship recurring to King Charles, as heir to his mother, it became again of its own nature, and returned to be of the patrimony of the crown, and so is to be understood in the annexation of the superiorities of kirklands, made 1633.

THIS went to interlocutor; and they FOUND the lordship of Dumfermling was truly of the annexed property: but they waved it, and would not give forth their answer to his bill, whereupon I hear he has made new addresses to his Majesty.

Advocates' MS. No. 124, *folio* 89.

1671. *February* 13. Anent a POSTSCRIPT to a LETTER.

THE Lords found a postscript of a letter as obligatory as if it were engrossed within the body of the letter, though it be not subscribed, providing the party make faith the postscript is also his hand writ.

Advocates' MS. No. 125, *folio* 89.

1671. *February* 13. Anent PROBATION by WITNESSES.

The Lords declared they would *ex officio* examine witnesses upon an allegeance of payment proponed against a bond, in regard there was a concurrence of several other presumptions, though this seems to take away writ by witnesses.

Advocates' MS. No. 126, *folio* 89.

1671. *February* 13. WISHART *against* Lady CAMNETHAR.

IN the case of Wishart against Lady Camnethar, daughter to Mr. William Arthur, they found, an infeftment of annualrent might be extinguished by offering to prove, (and that by witnesses, even the tenants themselves,) that the annualrenter had intromitted with as many mails and duties of the lands, though lands within the burgh, as will satisfy both the principal and annual.

This seems a very dangerous preparative to lay so great a stress upon the depositions of witnesses; and is contrary to our fundamental laws and practice that has been at much pains to avoid that inconvenience, and therefore allows nothing above L.100 to be proven by witnesses.

Advocates' MS. No. 127, *folio* 89.

1671. *February* 13. GEORGE BAYNE, Merchant in Edinburgh, *against* the BURGH of CULROSS.

THIS is an action against the Magistrates, to pay the debt for setting the rebel incarcerated in their tolbuith at his instance at liberty. The DEFENCE was that though incarceration *seu squalor carceris* be *pœna*, yet where the party was so very poor that he had no earthly thing, but from their prison went to an hospital, and there died, the bailies could never be made liable by setting such a miserable person at liberty.

This went to interlocutor; and the Lords assoilyied the Magistrates in regard of the rebel's poverty, and that he went to the hospital.

This seemed *pessime judicatum* to Mr. George Norvell and severals; for by our law there is nothing can put Magistrates in *bona fide* to set a rebel at freedom but only thir two, either a suspension and charge to set at liberty, or a consent under the party's hand by whom he was imprisoned. And the laird of Coldingknows, goodsire to this Earl of Home, being incarcerated within the tolbuith of Edinburgh for debt, upon a petition given in to the secret Council he obtained an order to the Magistrates to permit him to stay at such a person's house, in regard of his sickness and infirmity of body. This order the Magistrates, (having taken advice of their assessors,) did disobey, and next council day represented their reasons, whereupon the Council retracted their warrant.

Advocates' MS. No. 128, *folio* 89.

1671. *February* 13. Anent WARRANDICE in an ASSIGNATION.

OF old absolute warrandice in an assignation to debts did import that the debtor was sufficient and responsal; and in case it could not be got of the debtor, then the assigner was liable in warrandice to make it good; but now of late the Lords have found, in several cases, it signifies no more but that no other body has a better right to that sum than I have, and consequently you, who are my assignee; and that it is a true debt.

Vide infra, No. 246, *Nov.* 10*th*, 1671. *Barclay* against *Liddell.*

Advocates' MS. No. 129, *folio* 89.

1671. *February* 13. LORD HALTON *against* SCRYMGEOR.

THIS was a declarator of his gift of *ultimus hæres* to the deceased Earl of Dundee. Against which it was ALLEGED for Kirkton, That there could be no declarator, because by the very charter produced by them in process, there was a clause of substitution conceived in favours of the defender's goodsire, whereby failying of heirs-mail of Dudhop, the lands were tailyied to Kirktoun and his heirs. *Item*, offered to prove by writs in the charter chest, (which had been given up to Halton upon a naked bill,) that he was within the ninth degree of consanguinity to the last Earl, and that all by the male line; for proving whereof he craved inspection of the said charter kist. This was denied him; and he was appointed to pursue an exhibition thereof against Halton, as accords, for making his specific sibness appear: and for the tailyie it was broken since.

Upon which the gift was declared; reserving *ut supra.* This was thought hard.

Advocates' MS. No. 130, *folio* 89.

1671. *February* 13. Anent REGISTRATION of SEASINES.

A SEASINE being quarrelled because not registrate conform to the act of Parliament; it was ANWSERED, It needed not, being a seasine of lands lying within burgh, viz. Falkland.

REPLIED, That Falkland was not a burgh royal, but only of regality. DUPLIED, They opponed the case of Mr. James Cheap against the town of Falkland, wherein it was found to be a burgh royal, though now it bears no burden with the same; and the truth is, they have a charter of erection in a burgh regal, only the whole inhabitants of the town, or their authors, stand oblig-

ed to the King, each of them, to have conveniency and accommodation for men and horses every day, it having been the King's palace; for which causes he gave them all the privileges and immunities of a burgh royal. *Vide infra, No.* 331.

Advocates' MS. No. 132, *folio* 90.

Anent Apprentices.

Where a prentice was bound with a master by the space of five years, more or fewer, and either the master or the prentice dies before the expiring of the prenticeship, it has been questioned whether the whole prentice fee can be exacted yea or no; and the Lords have sundry times found, it being a contract *bonæ fidei, et bonum et æquum* claiming much part therein, the prentice fee should be divided *pro rata temporis* that the prenticeship subsisted, and no longer. *Vide infra, No.* 256. *Archibald Hyslop. Vide* Paulum, *in l.* 4, *p.* 5. *de Statu liberis.* Vandum *libro* 1. *varia: Quæstionum. Infra, July* 1677. *No.* 628.

Advocates' MS. No. 133, *folio* 90.

1671. *February* 21. Anent Apprentice fee.

This is an action at a Sutor's instance in the Potterrow, *against* ———, who was cautioner for payment of the prentice fee in the indenture, to pay it. Against which it was alleged, That he could not be heard to seek this prentice fee, because it was offered to be proven, (and a term behoved to be assigned for proving it, though he was in suspension, because it was *facti,*) that the boy staid not half a year with him, and that through his default, who did beat him till he was both blea and bloody, and to the effusion of his blood; and his cruelty was so great, that the boy durst stay no longer with him: and albeit moderate chastisement be permitted to a master, *attamen inhumanum et nullatenus Christianum est sævire in servos, l.* 5. *p. ult. et l.* 6. *D. ad legem Aquiliam.* To which it was replied, That in fortification of his charge, he offered him to prove that he used him no otherways than the other sutors in the neighbourhood use their prentices.

My Lord Advocate, before answer to the relevancy, appointed a conjunct probation to both.

Act. Charg. Beaton. *Alt.* Harper.

Vide Feb. 18, 1680. *Advocates' MS. No.* 134, *folio* 90.

1671. *February* 21. ——— *against* Corley, &c.

One having an infeftment of annualrent out of two tenements of land lying in the Canongate; and pursuing a poinding of the ground against Couley, and some other possessors.

It was ALLEGED, 1*mo*, That he behoved to restrict his annualrent to 6 for the 100. This they were content to do. 2*do*, The resignation whereon they were infeft was null, because made in the Bailie of the Canongate's hands, whereas it should have been in the Earl of Roxburgh's, who was then superior. The Advocate repelled the allegeance, in respect it has ever been the custom that these resignations have been made in the Bailie's hands; in respect of which he sustained the resignation. 3*tio*, ALLEGED, The decreet of poinding must only be for the one half of the annualrent, because the pursuer, since his infeftment of annualrent, has acquired the property of one of the two tenements which stood burdened and affected, so that *consolidatione et confusione tollitur obligatio*, and he is become both debtor and creditor as to the half, and he cannot have a servitude in that which is now become his own property, *cum res sua nemini serviat.*

To this it was ANSWERED, That the other tenement stood bound to him for his whole annualrent, since his right was an infeftment of annualrent out of both of these tenements, or any part thereof, so that it was altogether in his option to take himself to the one or the other for his annualrent as he pleased, neither could he be restricted; and it is like to more *correi debendi* bound to a creditor conjunctly and severally, who may distress any of them he pleases.

REPLIED, Albeit he may distress any of them for his annualrent, yet if one of them pay the whole, it is out of all question but the heritor thereof will have relief against the heritor of the other tenement also bound *pro rata*; and so this pursuer will so be both debtor and creditor.

TRIPLIED, That is true where they belong not both to one man; but here there was one common author of both.

My Lord Advocate inclined to find annualrent extinct *pro dimidio*; yet was sparing, and took it to himself in avisandum. *Vide infra, No.* 178. [*June* 22, 1671, *Balmerinoch.*]

Advocates' MS. No. 136, *folio* 90.

1671. *February* 21. The EARL OF CALLANDER *against* PATRICK HADDEN.

TWO comprisers, viz. Earl of Callander and Patrick Hadden, competing for the mails and duties of lands, it was objected by one of them against the other, that his comprising was null, in so far as it proceeded upon a gift of the ward of a marriage given, which marriage and ward could not fall, in respect the laird of Glennagies, by whose death the ward fell, was slain in the troubles at Dunbar in 1650; to whose heirs, by act of Parliament, their wards and marriages were gifted, viz. *Act* 30, *Parl.* 1640. To this it was ANSWERED, that 1*mo*, That act was introduced only in favours of the heir and relict of the party slain; but so it was, the proponer of it here was neither heir nor party, and so he had not interest to propone it. 2*do*, It was but a temporary act, to last during the time of the then troubles; but so it was, they were all after composed, and an act of oblivion and pacification past in 1641, and so it expired. 3*tio*, It is expressly rescinded. REPLIED, any thing that is

is competent to a party is also competent to a creditor of that party; and for its rescission there is a special salvo in the act rescissory 1661, that it shall noway prejudge private persons' rights; but *ita est* this is such. They were to have the Lords' answer.

The Lords found they would not extend the benefit of the act in 1640, to those slain in 1650, because that was not the war mentioned in the act.

Vide infra, June 1677, *No.* 579, § 5. *Brown and Arbuthnot.*

Advocates' MS. No. 137, *folio* 90.

1671. *February* 22. ALEXANDER BRAND *against* GEORGE GRAHAME.

The said George having the superior tenement to Alexander Brand's booth, he kept in the room just above his booth, his coals, his drink, his water, and all his other trash, by which coming through to his ware, it not only was considerably damnified thereby already, but might, in time coming, be much more if not prevented: whereon Alexander made his application to the Dean of Guild, who, after inspection and consideration taken of the prejudice done already, discharged the said George from using his said room to his neighbour's prejudice. This decreet was suspended, and reduction raised of it upon this reason, that the Dean of Guild had committed manifest iniquity in restraining George Grahame in his own property, and hindering him from using his rooms at his pleasure; especially considering that he and his predecessors have been in possession of using that room in the same manner these forty years. My Lord Advocate repelled the reason; found the letters orderly proceeded; and sustained the Dean of Guild's decreet, as most just and rational to the rules of good neighbourhood. This action came near to that in the civil law *de damno infecto.*

Advocates' MS. No. 138, *folio* 91.

1671. *February* 22. Anent JURISDICTION.

IT was questioned if a Sheriff, or other inferior Judge, in a process pursued before them, can grant a commission for examining witnesses which live without the jurisdiction of the Judge who is granter. Sir Jo. Cunninghame thought he could not grant a formal commission, since *par in parem non habet imperium*, and it is *extra territorium*; yet he gives *literas recommendaticias* by which they cannot be forced, but if *ex gratia* they depone, their depositions are as effectual to all points as if they had lived within his bounds; and when there are any persons to be examined who reside in Holland, France, Poland, or other places over seas, the Lords do not so much grant a commission as only recommendatory letters, the words being *enixe rogamus*, and as ye may expect the same favour of us in like case.

Vide J. Clarum *lib.* 5. *senten. par finali Quaest.* 26, who calls them *literas subdiales. Vide infra, Nov.* 1671. *Southesk*, 507.

Advocates' MS. No. 139, *folio* 91.

1671. *February* 22. Anent Transferring of Processes.

It being questioned whether a process before the Lords, having come the length of an act, and the pursuer dying, his heir or executor might transfer that process before an inferior Judge. Sir G. Lockhart thought he undoubtedly might, seeing that was only done to establish the right of it in his person, providing, when he comes to proceed in the cause, he brings it back again to the Lords. Yet there is a doubt anent sic causes as cannot be intented before inferior judicatories, as improbations, &c. though improbation may be proponed there by way of exception. The cause why it is sought to be transferred rather before an inferior Judge than the Lords, was because it will be cheaper by far than to pay L.3 for every sheet.

Improbations of executions used in processes before themselves may be pursued before inferior Courts, *ult. Nov.* 1630. *Laird Winstone* against *Cushine*.

Advocates' MS. No. 140, *folio* 91.

1671. *February* 22. Anent Suspensions.

Quæritur, if a charge of horning be suspended simply, whether this will debar all execution, both personal and real, so that the charger cannot comprise in the mean time? and it is thought it will, unless it reserve expressly apprising of lands: and it is now turned *a brocardicum* that nothing can stop signet letter but signet letters, and so nothing can stop a comprising but a signet suspension: and consequently it was arbitrary and illegal to my Lord President lately on a bill to stop Douchryes' son's apprising of my Lord Monteith's estate, and the messenger should have respected nothing but a signet suspension.

Vide infra, February 1677, *No.* 555, § 4.

Advocates' MS. No. 141, *folio* 91.

1671. *February* 22. Anent Executions.

In a pursuit of declarator of escheat, Objected, 1*mo*, Not tabled. 2*do*, The horning is null, because the execution bears not six knocks to have been given. Both were sustained, and the defender was ordained to table, and take up his executions and mend them. *Advocates' MS. No.* 142, *folio* 91.

1671. *February* 22. Hary Joussie *against* Captain Lermont.

In an action, Hary Joussie against Captain Lermont, the defender was not found liable for exchange and re-exchange, or protest money, seeing he had

no provisions of the pursuer's then in his hands, but something that is yet under debate and controversy.

Advocates' MS. No. 143, *folio* 91.

1671. *February* 22. The Earl of ERROLL *against* the Earl of FINLATOR and OTHERS.

THE barony of Arroll being sold in this Earl's minority to my Lord Kinnoule for 589,000 merks; in the contract Kinnoule, and sundry others with him, were obliged with that vast price to satisfy the particular debts given them up which burdened the estate of Erroll, and to report valid discharges thereof. This pursuit is now for seeing if the money was employed for the use to which it was destinate, and for reporting these discharges.

Advocates' MS. No. 144, *folio* 91.

1671. *February* 22. MR. THOMAS RAMSAY Minister at Mordingtoun, *against* the MINISTER and HERITORS of Aytoun Parish.

In anno 1650, the lands of Longformacus being dismembered from Mordington kirk, in place thereof the lands of Lamerton were annexed, and so continued till the 1663; at which time Mr. Wm. Home, minister at Aytoun, taking advantage of the time, he obtains a decreet of reduction of that decreet for non production. Mr. Thomas Ramsay having intented a reduction of this decreet reductive, and craving to be reponed against the same, because now he was willing to produce the decreet, and for the purging of his contumacy we smoothed it over the best way we could, they did at last repone us; and after much debate, the Lords' Commissioners for plantation of kirks did again annex Lamerton to Mordington, and for the stipend that was due furth of Lamerton they divided it equally betwixt them, and appointed it so to continue in all time coming, and ordained the minister of Mordington to enter to the possession of the half for the last crop, 1670; which interlocutor the heritors of Aytoun having stopped, because in it there was action expressly reserved to the minister of Aytoun for making up his stipend the length of what it was before, and having given in a bill upon the practique of the minister of North Leith and that of Dreme, which was annexed to Athelstanefoord kirk and some other things, upon the matter of which bill having heard us fully debate, they, notwithstanding thereof, adhered to their former interlocutor. See all fully in the informations. It was much talked of, to see a nonconformist minister gain a cause against a conformist in a mixed Court where there were so many churchmen.

Vide infra, No. 395, [*Minister of Aytoun* against *the Parishioners, June* 1673.]

Advocates' MS. No. 145, *folio* 91.

1671. *February* 22. Anent the MASTER'S HYPOTHEC.

Talking of the privilege of hypothec the master of ground has in his tenant's corns and other goods ay and while he be paid of his rent. Sir George Lockhart thought it altogether exorbitant and dissentaneous to natural equity, to extend this privilege so far as the master shall have repetition against a poinder arrester, or one who hath *bona fide* without fraud or guile bought the corns or goods in public market, the master having done no diligence himself; for if so, then there should be no free commerce nor traffic in moveables, which were very inconvenient. *See* Papon, *Lib.* 10, *Tit.* 3, *de Louage arresto* 4*to*. *Vide D.* 29*th March*, 1639, *Hay* against *Elliot*, and the cases there; *item*, 15*th January*, 1625, *Stewart*; *infra*, *November*, 1673, *Numero* 427.

Advocates' MS. No. 146, *folio* 91.

1671. *February* 23. The TUTORS of GOVANE *against* Her MOTHER.

THIS Govane's goodsire and father having been merchants in Glasgow, and her father dying and leaving her, his only child, behind him in her nonage, heretrix of a considerable fortune, what in land, what in money, the goodsire, (of whose acquiring the whole means was,) being on life, became administrator of the law to his grand-child, and in his testament did nominate several persons in whom he much relied as her tutors, being persons also sib to the pupil, who, *ex superabundanti*, took a dative and found caution. The lass being now out of her infancy, viz. past seven years of age, the tutors by an action against the mother, (who yet continues a widow,) crave the person of the pupil may be exhibited to them, to the effect they may have the custody of her, conform to the constant law and practice of this kingdom, which presumes tutors will be more careful of the education of pupils, and not so indulgent, by which many are sadly corrupted, as the mother will be.

The Lords, because they discovered an inclination in my Lord President towards the tutors, they therefore in a bang combined in behalf of the mother, only because it was represented to them that the President was a friend to the tutors, and carried it over his belly that the child should continue with the mother.

Vide 14*th July*, 1627, *Noble*; 4*th July*, 1629, *Langshaw* against *Muire* and the cases there.

Advocates' MS. No. 147, *folio* 91.

1671. *February* 23. ——— *against* The VISCOUNT of OXENFURD.

THE late Viscount of Oxenfurd grants a bond to Mrs. Mary Macgill his daughter, of 10,000 merks, which he obliges him, his heirs, and executors, to con-

tent and pay to her at her perfect age of fifteen years; the cause of it is love and favour, and for her maintenance. This bond she assigned, and dies before she attains to the age of fifteen. Her brother, now Viscount, being pursued to pay the sum, it is excepted that the bond pursued upon is null, in so far as the existency of the debt depended upon a condition which failyied, viz. her attaining the age of fifteen years, so that before that time *nec cessit nec venit dies*, and it being *dies incertus* it must be held for a condition. ANSWERED,—That the adjecting the term of fifteen years is only *causa differendæ solutionis*, but noways to suspend her right to the sum till it should appear whether that condition existed, yea or no.

The Lords found the bond conditional and null, because it never existed. See something like this in the information, *Sir William Stewart* contra *his brother Garntully*, (see *Nos.* 9, 420, and 492,) about the bond given to their sister payable at her marriage, and who died unmarried. *Vide l.* 213. *D. de V. significatione; item totum T. D. Q. dies ususfructus legati cedit.*

Advocates' MS. No. 148, *folio* 92.

See *25th February*, 1681, *Gordonston*.

1671. *February* 23. PROOF by WITNESSES.

IN an action for making up the tenor of a lost contract of marriage, for adminicling the wife's liferent provision in that contract, there was produced a charter and seasine relative to a contract of marriage of such a date: this was found sufficient for instructing the contract in that part; but when they came to make up to the provisions in favours of the bairns of the marriage, they had no other way but by offering to prove by the writer and witnesses in the contract that they were such as they did condescend upon, which being but a small competency, and noways unsuitable to the father's quality, this manner of making up behoved to be received. Against which it was ALLEGED,—That this were a most dangerous preparative to make up a writ by witnesses, though they be the witnesses insert, where there are no adminicles in writ that can be adduced for making it appear that ever there was any such writ. REPLIED,—That they have adduced adminicles in writ for making appear there was such a contract, and that by it the wife was provided in such a jointure; and all contracts having clauses of provision in favours of the bairns, which provisions are offered to be proven *per testes instrumentarios*, ye cannot divide the contract so as to stand *pro parte* and fall *pro altera parte*, especially they being noway exorbitant.

The Lords found it might be made up by the witnesses insert.

Advocates' MS. No. 149, *folio* 92.

1671. *February* 23. The LAIRD of SMETON and BEINSTON *against* ALEXANDER SMITH, Tenant in Waughton.

THIS was a count and reckoning, in which the creditors pressing that Alexander might count to them for the years 1658, 1659, and 1660, which were after the decreet of preference, and in whose prejudice, without taking notice to their rights as he should have done, he made payment of his duty these years to the Laird of Waughton. Against this it was ALLEGED,—That we being in an act of count and reckoning it behoved to be the rule by which we walked; but *ita est*, my Lord Whytkirk is nominated auditor of the counts for the year 1661 and thereafter, and therefore the defender cannot count *hoc loco* for these years. My Lord Whytkirk found he should not count for the years 1658, &c. here.

Then he craved we might be reponed against the decreet 1662, wherein he was holden as confest for 30 chalders of victual. After some debate they were content to repone him to his oath.

Then ALLEGED,—That he behoved to count to them all along conform to the tack-duty contained in the tack set him by Waughton in the year 1655, and not conform to the duty in the tack set in 1666; because beside that the Laird of Waughton had no power to set any tacks, being denuded by so many real rights and apprisings, there is likewise a great alteration in the qualities of the victual to the creditor's prejudice, 60 bolls of wheat being converted into bear, and bear into peas, &c. ANSWERED,—The laird was still heritor, and might well renew the tack, especially considering, that any alteration made in the qualities of the victual noways diminished the first tack-duty, because the bear the several years by-past has given as great a price as the wheat. We got the Lords' answer upon this, who found he must count, conform to the tack-duty contained in the last tack for all years since the same, unless the pursuers would offer them to prove that there was collusion betwixt the heritor and tenant, or that the second tack is in open diminution of the rental, or that the mains could have been then set to a tenant who would have paid more than that tack-duty.

Then I ALLEGED,—That he behoved to count, conform to the duty contained in the last tack, not only for the years subsequent to the last tack, but for the years preceding it, ever since his renunciation of the room; because in the tack 1655, there is a clause empowering the tenant to quit the tack in case he find himself too great a loser, but *ita est* in 1661 he renounced; and in 1664 renounced again; upon which renunciations, and in contemplation thereof, this new tack was set to him by the mediation of my Lord Whytkirk and Mr. John Drummond, and therefore this tack must be drawn back to the first renunciation as its proper cause, and must take effect from that time. This my Lord repelled, because before the entry, by virtue of this new tack, the old one, which was set but for eleven years, was expired. Then the creditors contended that Alexander behoved to count to them for the Crawlock meadow and the sheill park; though it be not within any of his tacks, yet being a part of the lands wherein they stand infeft, he must count to them for such years as he possessed it; and the time and years of his possession they refer to his oath.

To this it was ANSWERED,—That he not possessing these places the time of the obtaining the decreet, 1662, (which is the ground whereon this count and

reckoning proceeds,) he cannot count for them here in this place. *2do*, The creditors have no right to them, who stand only infeft in the maynes, and thir were never a part of the maynes. We had the Lords' answer on this also, and they found he could not count for them here; that which moved the Lords was the favourableness of the cause, being a tenant who had *bona fide* paid it already, though not warrantably, and to the right person, for double payment is most odious in law.

Then it was controverted anent the prices of victual these years for which he was to count; and my Lord declared he must count conform to the middle fiars of Hadington, and not conform to the highest, as Smeton pressed, though for some of it he might have got a greater price. See my informations of this cause.

Advocates' MS. No. 150, *folio* 92.

1671. *February* 23. His PARISHIONERS *against* REV. ARCHIBALD MACKINLA.

ONE Mr. Archibald Mackinla being pursued by his parishioners upon the act of Parliament, ordaining the parish to make the minister's manse sufficient to him at his entry, but appointing the incumbent to keep it up on his own charges and to leave it in as good condition as when he found it, and in case he neglect, ordaining action to be sustained against him, his heirs or executors, for refunding the damage, which, upon visitation, it shall be found to have received during his incumbency; Parl. 1612, cap. 8, *ibique* Paponius; act 20, *anno* 1663: but they subsumed he had deteriorated the said manse in the sum of 300 merks, which was made appear by cognition taken of it both at his entry and at his departure, finding it damnified in the said sum: *item* they pursued him both to pay them this 300 merks, as also to restore them their mortcloth which he had taken away with him at his departure. ANSWERED,—They were only disaffected persons, he being a loyal conformist minister.

The Lord Advocate found the summons relevant, only in case they succumbed in the probation that they deserved a very sharp censure.

Advocates' MS. No. 151, *folio* 92.

1671. *February* 23. The SCHOOLMASTER of Drone *against* some HERITORS in Dumbarnie.

THE Schoolmaster of Drone pursuing some heritors in Dumbarnie to pay their proportion of the stipend contained in the stent roll; ALLEGED,—They paid that proportion he charged for to another schoolmaster, and so could not also pay to him. ANSWERED,—That by acts of Presbytery they were disjoined from that place to which they alleged they paid that stipend, and annexed to Drone. REPLIED,—This disjunction and dememberation is only *quoad officium* but not *quoad*

beneficium. DUPLIED,—*Qui habet incommodum,* viz. the pains, *debet et habere commodum.*

My Lord Advocate found the letters orderly proceeded; only ordained them to have suspension upon the two Schoolmasters' competition, without caution or consignation.

Advocates' MS. No. 152, *folio* 92.

1670. *June* 14. BYRES, &c. *against* The BAILIES of Hamilton.

LYLL., bankrupt, after he has disappeared, having made a disposition of his whole goods and Merchant ware to some of his creditors, those who were prejudged thereby made their application to the bailies of Hamilton, (in which burgh the said bankrupt had his house and shop,) entreating them, notwithstanding of the said disposition and instruments of possession taken thereon, to secure and sequestrate the said bankrupt's goods till such time as they might see who had best right thereto; which the bailies thinking they might warrantably do, they caused nail some plates of iron on the bankrupt's door. Upon fact they are convened by the creditors, in whose favours the disposition was made, to re-deliver the goods or prices thereof, with 1000 merks, wherein they were damnified by the bailies their impeding them to take possession of these goods, and so to perfect their disposition. The first calling we did cast, in regard there was no inventory produced, conform to which though they libel.

At the next calling I alleged no process while the bonds for which the said disposition was granted, and to which it relates were produced. This was repelled. Then we proponed a formal defence, that this being a disposition made by a bankrupt after he had fled, gratifying some of his creditors *in fraudem* of others his just and lawful creditors, the same was *ipso jure* null, by way of exception or reply, as the very act of Parliament 1621 bears; especially thir pursuers having been upon the contrivance of the said disposition with the bankrupt, (for the which we craved their oaths of calumny,) and so can never furnish them an active title to pursue on.

This my Lord Newbayth repelled, because there was no reduction at any other creditor's instance, and that it was not competent to the bailies. And for the act of Parliament, he answered, the same appoints many things to be received by way of exception, to which the Lords require a reduction: Sir J. Harper offered to produce practiques where the Lords had found such dispositions by way of reply null, which he was ordained to do.

Then we ALLEGED,—That the bailies had done nothing in this case but what *ratione officii* they were bound to do, the creditors prejudged having made their address to them. The Lord Newbayth found, though the same might have been lawfully done by magistrates of a burgh royal, yet he found it unlawful in bailies of a burgh of regality as Hamilton was; notwithstanding it was pressed by Sir John, that the disponer being bankrupt and *in fuga,* (as it would have been lawful to any creditor to have arrested at his own hand the person of any such bankrupt, being his debtor,) so it was most warrantable for the bailies to seques-

trate his goods, to the end the same may be made furthcoming to all his creditors proportionally; of which my Lord doubted exceedingly if a creditor at his own hand might with us arrest his debtor bankrupt; yet that is clear by the civil law, and Sir John was appointed to produce practiques thereof.

Act. Dinmuire. *Alt.* Harper and Lauder.

Advocates' MS. No. 15, *folio* 73.

June 18.—In the foresaid action, *Byres, &c.* against *Bailies of Hamilton* at *No.* 15, *referente Domino* Newbayth,—The Lords before they would give answer upon the relevancy of the summons, ordained the bailies to depone upon the points thereof, reserving to all creditors their particular interests.

Advocates' MS. No. 22, *folio* 74.

1671. *February* 25.—The bailies having deponed upon the points of the pursuer's summons, conform to the interlocutor marked No. 22, in this manner, that upon the address of sundry creditors within their town they had caused secure the door by nailing iron plates upon it; and that notwithstanding thereof the bankrupt Lyll's wife, with his good-brother, entered in the night at a hole they made in the wall without their knowledge or authority, and clandestinely conveyed away all the goods and ware that was in the shop, &c. (See *Mackenzie's Observations on the act* 1621, page 149.)

This deposition coming to be advised, the Lords found the bailies had power to secure and close the doors upon the application foresaid; only assign them to the 1st of June to prove how the merchant ware and other goods were carried away furth of the house and shop, notwithstanding of the close doors, whether by their authority or by force in the night time. *Vide Hip. de Marsil. singul.* 43 *and* 243, 282, 284. This was very just, and in such cases of necessity the law will allow every private man to secure the person of his debtor fleeing; *ergo multo magis* his goods, because in cases that cannot admit of delay, or if delayed, then the opportunity loseth, the law makes every man a magistrate, and invests him with a public power; for if in that case a creditor were put to implore the office of the judge for arresting his debtor whom he finds fleeing, he would be gone ere he could get his concourse. *Item*, where a man is assaulted that he must either kill or be killed, then the law puts the sword in every private man so stated his hand, because the magistrate who *regulariter* bears the same cannot then be had, to preserve himself, and in so doing to avenge the wrong done to the public peace. *(Satius est enim occurrere in tempore, quam post vulneratam causam remedia quærere, L.* 5 *C. in quibus causis in integrum restitutio, &c. L.* 1 *C. Quando licet unicuique sine judice se. Vide etiam L.* 5 *C. de jure fisci et L.* 4. *C. ad legem Corneliam, de sicariis.) Vide T. C. Quando liceat unicuique sine judice se vindicare; vide l.* 10, *p.* 16, *D. Quæ in fraudem creditorum.* Sheidivinus *ad principium Tit. Instit. de actionibus, in verbis In judicio.* Baptista Caccialupus *in tractatu suo de debitore suspecto et fugitivo, p.* 413. Harprechtus *ad d. princ. Instit. de actionibus, No.* 35, *et seq. et* Peresius *ad Tit. C. de in Jus vocando.*

Advocates' MS. No. 153, *folio* 93.

1671. *February* 25. Anent the TRANSFERRING of APPRISINGS.

WHERE a man's name is borrowed to the leading of an apprising, the ordinary way is, that he grants a back-bond to the person for whose behoof it is, obliging him to dispone the apprising when it shall be led to him, with all that has followed or may follow thereupon. Though this be the common style, yet it proves oft inconvenient; for if the party entrusted die before he dispone, or the person for whose use it is, the back-bond must be tranferred either in the heir active or against the heir passive; and if the person intrusted his heir renounce, or let a decreet go against him as lawfully charged, then he must comprise or adjudge of new again; yea the trustee's creditors will come *in pari passu*, (they doing diligence,) as to the very lands to which he had but right in trust. And therefore it's only fit to take a formal disposition *per verba de presenti* to the comprising to be led at his instance and all that may follow thereupon, with an obligement to renew if required. (*Vide infra, February* 1676, *No.* 464; *item*, 1*st December*, 1671, *No.* 275; *item in November*, 1677, *No.* 647, § 2.) Neither will any object to me that a nonens cannot be assigned nor disponed; but such is a comprising not yet led; for they may as well say that a man cannot sell nor dispone a liferent, seeing it has no being but for the year current, and the subsequent years are not due unless the liferenter outlive the legal terms of the same; and yet there is nothing more ordinary than disponing of liferent rights. Neither does that clause, whereby I take him obliged to renew it if need be, prejudge, because a man who has a general assignation to a number of debts due to his cedent has right good enough to them by that general assignation, and yet he may take a special assignation to every one of them apart.

Advocates' MS. No. 154, *folio* 98.

1671. *February* 25. Anent The REGISTRATION of SEASINES.

JAMES STEWART alleging that though by act of Parliament 1617, seasines must be registrate within sixty days after they are given, yet the intention of it was no other but that it might be registrate thereafter, and that such a seasine would stand good against any other right posterior to the date of its registration, though the sixty days were not precisely kept. Sir G. Lockhart represented the vanity of this, seeing the lawgiver by prefixing that space of sixty days, hath had an eye and special regard to the convenience of the lieges, that they might not be put to an irrational and uncertain inquiry after incumbrances upon men's lands, anent which they intend a bargain; so that when I have suspicion of any infeftment given about such a time, I have no more to do but to look by the space of sixty days after its date, and if I find it not within that time, then the law makes me secure in so far as I need to take no notice of it. Whence ariseth another question, whether a seasine though not registrate, will be valid to debar me who acquire a posterior right in these lands, if I know of your right before I purchased my own? It seems that it should be good enough against me, seeing the law has

got its intent, I knowing of it, for it designs no other thing by appointing registration, but that it become public and come to men's notice; yet this private knowledge puts no man *in mala fide* to take a right to these lands; for though I know ye have a seasine, so it is as true I know it yet to be null and imperfect till it be registrate: just like an assignation to a debt, I know ye have one, but it is not intimate, that will never hinder me, nor put me in *mala fide* to take an assignation to the same debt; and if my assignation be first intimate, I will be preferred to you; *item*, though the debtor know his bond is assigned, yet he may pay to the cedent without respect to the assignation, at any time before it be legally intimate: Dury 15 *June*, 1624, *Adamsone*, yet see *ult. Martii* 1624, *L. Dunypace and Sands*: for *id tantum scimus quod de jure scimus*.

Advocates' MS. No. 155, *folio* 93.

1671. *February* 25. HELEN HAMILTON *against* WM. BELL and OTHERS.

THIS is the relict of James Bell the merchant, who as donatrix to her husband's escheat, pursues a special declarator against several alleged debtors to the said James the rebel; and amongst others William Bell his brother being called, and all being referred to his oath, I alleged I would take no day for producing him, because I offered me to prove, that after a fitted account betwixt this pursuer's husband and the defender, the defender was so far from being debtor to him in any sums of money, that to the contrary he acknowledges himself to be debtor to William, now defender, in L.36 Sterling; and lest they say that William might be debtor to the rebel for causes after that, it is answered, that cannot be, because this fitted account is subscribed on the day immediately before James died. *Vide infra, No.* 711, *Deans* and *Purves* [18*th January* 1678.]

To this it was ANSWERED,—That this fitted account being subscribed by the rebel long after his denunciation to the horn, there being *jus quæsitum Domino Regi superiori, ejusque fisco per rebellionem*, he could then do no deed to the prejudice of the king's fisk or his donatar. Yea, in the case of *Glover and George Bayne*, the Lords found a rebel after he was registrate at the horn, could not assign a debt owing to him, in satisfaction of a debt owing by him to one of his creditors. Replied,—That this account being before the gift or general declarator, it were a hard matter to find that he could not therein declare he was addebted to his brother in L.36, upon the casting up of all accounts betwixt them. I confess, deeds after the gift or declarator by the rebel, may be upon very plausible grounds called in question; but to quarrel all his actings from the time of the denunciation, seems very hard and of dangerous consequence. Yet my Lord Advocate inclined to find that he could not fit an account after he was lying at the horn. *Infra No.* 422, and 479.

Advocates' MS. No. 156, *folio* 93.

1671. *February* 25. Anent Advocates.

It was debated in a cause, whether an Advocate could be forced to depone upon a conveyance made by him in behalf of his client. And it was alleged, an Advocate was not obliged to reveal his client's secrets, no more than a Priest should reveal confessions,) except it be *in materia falsi* or *læsæ majestatis*. Yet advocates have been often examined upon their client's businesses. *Vide* Dury 14*th November*, 1628, *Betsone* against *L. of Grange*, and *Sir Robert Sinclair* and others were forced to depone in *Lewie Barclay's* action. See Mr. Styles' English practical register voce *witness*, *page* 569. *Vide* H. de Marsiliis, *singulari* 424. *Vide infra*, *February* 1674, *Dumfermling and Calendar*, *No.* 445, *in fine*.

Advocates' MS. No. 157, *folio* 93.

1671. *March* 5. Clause.

The following clause was advised by Sir T. Wallace, in an heritable right, *viz.* a contract of wadset granted by a debtor to his creditor in his lands, with a precept of seasine, and upon which seasine did actually follow; that notwithstanding of the law, upon the death of the receiver of the wadset this right would appertain to his heir and not to the executor, yet *hoc non obstante*, it was the express intention and desire of all parties that this right might descend to the executor, notwithstanding of the common law to the contrary; to the which, the parties by this special paction will a derogation: and if it shall chance the heir to quarrel this, and to lay claim to the succession of this right, then and in that case the parties will and appoint this present real right to become null, to annihilate and expire as if it had never been, and the right to return to the bounds of a naked personal obligement, so that the sum in the wadset may ever belong to the executor; and ordain this clause to be inserted in the seasine, and all the other rights to follow thereupon. Though this was called the opinion of an eminent lawyer, yet some differed much from him, and think it a clause not sustainable in law; *nam pactis privatorum non potest derogari juri publico*, *l.* 38 *D. de Pactis*; especially such fundamental laws, as the heir's succession in real rights: hence a man cannot leave his wife tutrix to his bairns, in the case that she superinduces a second husband, (*infra February*, 1677, *No.* 555, § 2, see *February* 1680,) because it is a dispensing with a general law that deprives her of the tutory of her own bairns, so soon as it appears *eam convolasse ad secundas nuptias*: *vide* 8*th March* 1636, *Stewart* against *Anderson*, and the civil law there cited. And I would gladly know if it would be a valid paction betwixt a debtor and his creditor that, notwithstanding of the common law appointing no more profit to be taken but six for each hundred, yet that the debtor *ex certa scientia* dispenses with the said law, and is most willing cheerfully to pay eight or ten per cent; sure this would not be sustained but the creditor would be punished as an usurer; so that it is hard to determine how far persons may renounce laws introduced in their favours, (though *de jure cuilibet licet renuntiare favori pro se introducto*, *l.* 29 *C. de pactis*;) and it is thought debtors gave only valid discharges of the act of debtor and creditor 1661, because by the very act power was given to any who pleased to renounce it. And I ever doubted much of this reservation, I have seen cast in heritable bonds and real rights, that notwithstanding *de jure* a man on death-bed cannot dispone upon heritage, yet that

it shall be leasum and lawful to him at any time in his lifetime, *etiam in ipso articulo mortis* to uplift it, dispose of it, leave it by his heir to him he pleases, &c.: or thus, where a man and his wife are infeft upon a comprising in liferent or conjunct fee, and his three daughters in fee (this is *Magnus Ayton's* case), but with this provision that it shall be lawful to him, albeit the fee be provided to his daughters, to uplift the sum at any time in his lifetime though on death-bed, and dispose and use it at his pleasure, the question falls whether or no by virtue of this act *inter vivos* a man can validly dispose upon his heritage *in lecto ægritudinis* to the prejudice of his heir, so that it will defend against a reduction intented by the heir *ex capite lecti*.—See more of this in *February* 1670, *Mossman* against *Bells*, No. 7. *Advocates' MS. No.* 160, *folio* 94.

1671. *March* Anent the JURISDICTION of the COLLEGE of JUSTICE.

IT is uncontroverted but the members of the College of Justice *in civilibus*, have *præscriptionem et privilegium fori*; none others, by acts of Parliament, being judges competent of their civil actions but the Lords of Session only. But whether it be so *in criminalibus*, as riots, or the like, may be much doubted. Paulus Voet in his tract *De Statutis*, page 282, states this question, and thinks an exemption to advocates, from answering to inferior courts of this kind, should not extend to criminal actions. Upon the one hand, it seems that the magistrates of Edinburgh, (though justices of peace within themselves,) nor no inferior judges to the Lords of Session, Secret Council, or Justice, can meddle with them, because by act 29th, Parl. 1661, ratifying the whole College of Justice's privileges, it is declared, that all liberties and immunities belonging to the Lords of Session are extended to belong, and appertain by the advocates and all other members of the College of Justice; but *ita est* by express act of the same Parliament, *vis.* act 38, containing instructions to the justices, the said justices of peace have no power to meddle with the Lords of Session; *ergo* neither with the other members of Session. (*Vide infra, February* 1678, *No.* 721.) Yet by that same 38th act, it would seem in the matter of riots and such like, the members of Session may be punished and proceeded against by the justices of peace, and consequently by the magistrates of Edinburgh, because they are empowered to proceed against all offenders whatsoever, under the degrees of noblemen, prelates, counsellors, and senators of the College of Justice; unless we say the whole members of Session must be understood there under the Senators of the College of Justice, as enjoying all the same privileges with them. Our privileges got a sore dash in 1670 by the eighth act of that Parliament, where the Lords of Session their privileges are ratified, and nothing of the rest—See my animadversions on that act.

Advocates' MS. No. 161, *folio* 94.

1671. *March* 9. Anent the KING'S HYPOTHEC.

SEVERAL creditors contending for the escheat of James Hamilton the Collector, before the Exchequer, Mr. Stamfield was preferred to it, but with the burden of 5 or 6000 pounds Scots, due by the rebel to the king for custom and excise,

which he behoved presently to lay down over the board ere they would expede the gift to him. This quality being so heavy, made him doubt much if he should so accept the gift or no. This speaks the king's privilege of a tacit hypothec, by which the law prefers him to all others for his dues, though never so lawful creditors.—See June 10, 1631, and my marks there, *Peebles* against *Scot.*—See Manuscript E, *June* 16, 1681, *Broomhal*, page 202.

Advocates' MS. No. 163, *folio* 95.

1671. *March* 9. SIR ANDREW RAMSAY of Abbotshall, *against* The LAIRD of Bogie.

THE lands of Abbotshall, Milnetoun, Bogy, Benochy, Basusney, Walkerlands, commonty of the burgh of Kirkcaldy, and divers other lands lying thereabouts, being all ancient feus of the abbacy of Dumfermling, are clogged and affected in the very bosom of their original rights and infeftments with this express burden and reservation, that it shall be leasum and lawful to the burgesses, indwellers of the burgh of Kirkcaldy, owners of the saltpans there, to dig, win, work, and carry away coals, limestone, clay, and quarrell, within any part of the bounds of the lands liable in manner foresaid, for furnishing of coal to the use of their saltpans; by which it appears the pans have been the oldest feu, and the foresaid lands being feued out thereafter by the abbot and convent, they reserved the whole coal for the use of the said pans. Henry Millar, James Turpie, and several other persons in anno 1632 having the heritable and irredeemable right of the saltpans within the burgh of Kirkcaldy, and consequently the sole right to the coal within the lands aforesaid, finding themselves unable to compass so great a design as the bringing of a coal to be a workable coal, and that it would require a person of substance and power to effectuate it, they enter in a transaction with the Earl of Dalhousie, then heritor of Abbotshall, by which they dispone to him the hail right they and their predecessors have or derive from the monastery of Dumfermline, to the coal not only within his own lands, but also within Bogie and the hail other lands, which by their old infeftments stand liable to them in coal; providing he furnish them coals for the use of their pans at such reasonable rates as he and they should agree upon from time to time. In prosecution of which right the Earl in 1637 did put down an eye within his own lands, (and as they say, did cost L.10,000 Scots in the whole,) brought it to be a workable coal, and conform to his agreement with the pan owners, he served them upon their own expenses. Notwithstanding of this right in the Earl of Dalhousie's person, Sir John Weimes of Bogie, in anno 1646, clandestinely procured a signature from his Majesty, ratifying to him four saltpans, the right whereof he had acquired from the pan-owners; and withall takes a gift from his Majesty, (as having succeeded in place of the commendator,) of the whole coal within the bounds of the haill lands, standing obliged by their original feu charters, to furnish coals to the saltpans of Kirkcaldy; and in a compliment, forsooth, sends a discharge of this his gift, in so far as it might extend to Abbotshall and Westmilne, to the Earl of Dalhousie.

In this posture affairs stood till Bogie having of late acquired the right of two other saltpans, and grudging that Sir A. Ramsay (who had succeeded in the right

of the lands of Abbotshall, &c. to the Earl of Dalhousie,) should have the benefit of the renunciation foresaid, and calling to mind it was allenarly of the right he had to the coal by virtue of that charter 1646, and so would not meet any new gift of that coal if he should acquire the same; therefore, he causes draw a new signature, ratifying all his former rights to the pans and coal, with a *de novo damus* of the coal within the hail lands of old liable, and *per expressum* of the Westmilne and Westmilne lands, which is Abbotshall, thinking this way to evacuate and elude his bond or discharge; this signature he was to get past by my Lord Dumferling's moyen, for which he was to pay him a sum of money. This coming to Sir A. Ramsay's knowledge, out of a principle of pure and absolute necessity, and for mere self preservation, he procures the just double of Bogie's intended signature (only *mutatis mutandis*) past his Majesty's hand in his own favours; narrating the pan-owners' right, both to pan and coals, their disposition of the whole affected coal to the Earl of Dalhousie, Bogie's renunciation of his signature 1646, and giving to Sir A. the right of bigging new pans, not only within the bounds of his lands, but within the town of Kirkcaldy, and giving him the hail coal, not only within his own property, but within all the lands contained in the pan-owners' disposition.

Sir A. having presented this his signature to be past in Exchequer, the Laird of Bogie stopped it, craving to see, which was granted; and being heard thereupon, he declared he was content the gift should pass for the coal within Sir Andrew's own land; but for the salt pans and the coal within his lands of Bogie, and all the other lands above mentioned, he alleged he had a prior right thereto, by virtue of his charter 1646, whereupon infeftment had followed.

To which it was ANSWERED,—That Sir Andrew would not controvert his right to four salt pans, he making it appear he derived his right thereto from the pan-owners; but for the coal, his gift thereof from the king in 46, could not be respected, because any right the king could lay to that coal was as coming in the place of the commendator of Dumfermline; but *ita est*, if the said commendator and convent were debating with Sir Andrew, he would exclude them eternally, in so far as they were denuded of any right they had to that coal in favours of the pan-owners of Kirkaldy, which pan-owners in anno 1632, fourteen years before Bogie's signature, disponed their right to the Earl of Dalhousie, in whose right Sir Andrew has now succeeded; and so Bogie's right to the coal proceeds *a non habente potestatem*.

REPLIED,—That the pan-owners' right to the coals within Abbotshall, Bogie, and the other lands above written, was not a right to the property of the coal, but allenarly a servitude upon the coal within these lands, affecting them to the pan-owners for pan-wood, and the superplus of the coal was reserved to the convent, to dispose upon at their pleasure; so that the king, upon the suppression of the convent, having come in their place, had undoubted right to all that superplus; and, consequently, it must belong to Bogie, the king's donatar therein. And for the disposition 1632, made by the pan-owners to the E. of Dalhousie, the same is evidently null, in so far as all the right they had to the coals, within the bounds mentioned in that disposition, being only a servitude, in so far as may serve their salt-pans, they could not dispone the same in part without the pans; but the Laird of Bogie, who has since acquired the right to the pans, must also have the sole right to that servitude of coal and pan-wood, else how should the

pans be served? they should fall to ruin, and the king shall lose his feu-duty, payable to him yearly furth thereof.

TRIPLIED,—It is a great mistake, that the pan-owners' right to the coal is only a servitude, whereas, to the contrary, by the feu charters of Abbotshall, Bogie, and others, the very property of the coal is reserved to them; and for the ruining of the salt-pans that is but *ab incommodo, et incommodum non solvit argumentum.* Bogie, for proving of his reply, produced a contract betwixt Robert Pitcairn, commendator of Dumfermling, and the convent, and twenty or twenty-three burgesses of the town of Kirkcaldy, owners of the salt-pans within the said burgh, dated at Dumfermling, the day of January, 1575, wherein the said commendator and convent, for sums of money paid them, confess, as notourly known to them, that the said pan-owners and their predecessors were duly and lawfully infeft in the salt-pans, houses, girnells, yairds, &c. by the convent of old, for the time heritably in feu-farm, for payment yearly of eight bolls of salt, and forty shillings money for ilk pan, and acknowledge the payment of the said salt penny maill for all years preceding that contract; and because of the late troubles, *viz.* the pest in Kirkcaldy in 1574, and by the French their coming into Fyffe from Leith with Monsieur Dosell in 1560, all their evidents and infeftments are perished, and not now gettable, at least some of them, being then hid under ground, were now so consumed as they were not now legible; all which consisting in the convent's special knowledge, therefore they oblige them to infeft and seize the said persons and their successors of new ilk ane for their own parts, as is therein divided, to be holden of the convent in feu-farm, for payment of the above-mentioned duty, they doubling the feu-farm at the entry of each heir; and some of them are ordained to be infeft in half pans, and some in whole pans, and there will be in all above twenty pans. Then their infeftments are appointed to contain licence and full heritable liberty to the said owners, their heirs, and assignees, to win coals and pan-wood, for serving of the said coals in any part of the bounds of the lands of Abbotshall, Myletown, Bogie, Bennochy, Balsusney, Smeiton, commonty of the burgh of Kirkcaldy, borrow acres, feu acres, East Milne and West Milne lands, wherever they please, &c. *item* with liberty to them to seek clay, quarrell, and limestone, within all the bounds from Ravenscraig on the east to the Westburnmouth on the west. *Item*, if any new pans besides these disponed be bigged, then that the pans already bigged be first served with coals, and if any want, through scantiness of coals, that it be the new pans; *item*, the convent are to have their coal greives concurring with the owners' coal greives, to the effect they may perceive what pan-wood, with fire to the owners, and polkfulls foresaid, shall be necessary for their staiking, that the rest and superplus of the daily coals, to be win and brought to the coal-heughs within the said commonty of Kirkcaldy, shall come to the utility and profit of the said commendator and convent; at the least, that it may be in their option to bestow the same on the owners or not. This contract proves noways the allegeance made by Sir John Cunyghame, except only for the superplus of the coal win within the commonty of the burgh of Kirkcaldy, and scarce for that. For, 1*mo*, there is not one word of a servitude in all this contract, but a full and heritable licence to the owners to use that coal for their pans. 2*do*, That the very property of the coal is affected to the pans appears by this, that besides the twenty pans here disponed, new pans may be bigged, and which pans must all also be served by that same coal; now, if it were a servitude only the pans had, there

could be no new pans bigged, seeing that way they will do more than exhaust the whole coal within the foresaid lands; and so the property should be altogether useless to the heritor, for *non aliter licet uti servitute nisi secundum modum a domino fundi concessum;* next the heritable licence of winning coal is given to them, their heirs, and assignees.

Bogie also ALLEGED,—That Dalhousie's accepting the discharge 1646, was a clear concession he had no right to that coal himself, and a homologation of Bogie's new acquired right. But this did not deserve an answer. Sir G. Lockhart was of opinion that Bogie's renunciation, (though it renounce only all right he can lay to the coal of Abbotshall by virtue of that signature,) yet that it would have defended against any new right he should acquire to that coal thereafter, because he being Dalhousie's author in that renunciation, he could do no deed in prejudice thereof, and he behoved to warrant it; of this I am not so clear. The Lords of Exchequer refused to remit the discussing of the competition of rights to the Judge Ordinary, and in the mean time to pass the signature, which is their ordinary practice in the like cases, (as was desired by us,) but delayed to give any answer till Sir Andrew should produce the pan-owners, (who be authors to the E. of Dalhousie,) their rights. They should have considered the 51st act of the Parl. 1661.

Advocates' MS. No. 164, *folio* 95.

1671. *June* 10. LORD DRUMLANRICK *against* SCOT.

THIS Scot having adjudged the lands of one of my Lord Drumlanrick's vassals, upon the renunciation of the apparent heir; and having charged my Lord to infeft him thereon, he suspends upon this reason, that being superior, it is leasum to him upon payment made to the creditor of all his just sums, to take the lands to himself; which he is content to do; and, therefore, craves the adjudger may assign him to his diligence. And though this be an adjudication led before the act of Parliament 1669, which equiparates *in omnibus* adjudications to comprisings, (and so by it there can be no doubt of adjudications after the act,) yet the *ratio* being *eadem*, and no imaginary disparity assignable why the superior should have right more to use that method with the appriser, than an adjudger, we must say the same law obtains in both.

The Lords found a superior might redeem a creditor adjudger; but if he did he should have no year's rent. Neither when the debtor comes to redeem the lands from him within the legal shall he get deduction or retention of a year's rent; so that the debtor is bettered by the superior taking the right of the said diligence, than if it had stayed in the person of his creditor.

Advocates' MS. No. 165, *folio* 97.

1671. *June* 18. PITREICHY *against* The LAIRD OF WOODNEY.

ALEXANDER SEATON, merchant in Edinburgh, being debtor to Udney in 2000 merks, and to Pitreichy in 1400 merks; and one Ruthven being debtor to him in a sum near equivalent to them both, he for their payment assigns them in and to the sum contained in Ruthven's bond; and though the Laird of Udney, (as having the larger share,) got the keeping of the said assignation, and its grounds and warrants, yet there was an express quality in the assignation in favours of Pitreichy, *vid.* that Udney was assigned to the said bond for himself, and for the special use and behoof of Pitreichy, to the effect he, out of the said sum, might be paid of 1400 merks addebted to him by the cedent. Notwithstanding of this clog, it would appear Udney transacts for the haill, pays himself, and leaves Pitreichy to the lang sands. Pitreichy raises a summons against Udney for declaring there was such an assignation with a quality in his favours, and how it was in Udney's custody, and how without his knowledge and consent he had uplifted the said sum, both his own part and his, and had given back the bond; and therefore craved he might be decerned to pay to him his share, or put him in his own place as to the said bond and assignation.

Against this it was ALLEGED,—That Pitreichy could never be heard to reclaim against the upgiving of the bond, in so far as his eldest son and apparent heir, who was *præpositus negotiis*, his trustee general, him whom he had employed to do his business here at Edinburgh, went along with him in his transaction with Ruthven the debtor; approved thereof; received in behalf of his father 500 merks of the sum addebted to him; accepted of a bond for the superplus from one Campbell a merchant in town; and granted the defender a bond to cause his father hold firm and stable what he had done in relation to that particular; took home Campbell's bond with him to his father; told him what he had done; who approved of his service, accepted the bond as his own evident, and kept it more nor a year in his own custody; till, discovering Campbell his debtor to be not so responsal, he attempts to overthrow and undo the said rational transaction made by his son either by his previous warrant, at least *id ratum habuit*, consequentially because being certiorate thereof *non reclamavit non contradixit.*

To this it was ANSWERED by Sir George Lockhart,—That trustee general was not *nomen juris*; and he entreated Sir J. Cunyghame to give him a name or title in law by which the son could do any such business without a mandate from his father. Next I have oft heard in law cases wherein the father can oblige the son, but remember not any wherein the son can bind the father without his consent. *3tio*, The assignation expressly ordaining the 1400 merks to be paid to the father and not one word of the son, there is no shadow nor pretext of law can be brought, why the son's interposing in that matter wherein he had no interest, should prejudge his father. *4to*, The son, as minor and lesed at the time, has revoked the said deeds, and raised reduction thereof upon the foresaid heads. *5to*, If they will say that what the son did was by order from his father, we will find it relevant of consent, or that the father *ratum habuit* in the general; but for the qualification that the father must be presumed to have ratified, in regard he took the bond from his son, kept it beside him a certain space, complained not that his son had overacted, the same is a most irrelevant condescendence,

noways inferring the meanest degree of a homologation; for what should he have done with it, should he have thrown it away? *6to*, The son never consented to the upgiving of the bond and assignation, because it is offered to be proven, if need be, that he had given back the same by the space of a year before the said pretended assent given by the son.

REPLIED,—It had *nomen juris*, in so far as the son was *utilis negotiorum gestor* to the father.

DUPLIED,—It was never heard in the world that *negotiorum gestor* had power to uplift or discharge sums. *2do*, The defenders intimated the plea to young Pitreichy's Advocate, viz. to Mr. William Moir, whom they minded to pursue, as him who induced them to make that transaction. And for the manner they qualified the father's ratihabition, the defender craved the Lords' answer thereon.

This Halkerton refused, except they would say that old Pitreichy accepted of Campbell's bonds from his son as his own evident; which was no otherwise probable than by his oath.

Advocates' MS. No. 167, *folio* 97.

1671. *June* 13. ALEXANDER and OTHERS, *against* The LORD and MASTER of Salton.

WILLIAM GRAY of Pittendrum, Provost of Aberdeen, dying without heirs of his body, and his father being a bastard, his estate falls to the king as *ultimus hæres*. The gift thereof is made over to the Earl of Hadington, who obtains general declarator thereon; and before his death assigns the right of the gift and declarator to Alexander Bailie in Aberdeen, one Mercer, and one Johnstone there. They finding the laird of Philorth, now Lord Salton, debtor by bond to the said William in the sum of 10,000 merks, they pursue him to make payment to them as having right in manner foresaid of that sum.

ALLEGED,—They cannot be decerned to pay the said sum; because they offer them to prove by the pursuer's oath of knowledge, that the money contained in the bond pursued on is a part of the price of the lands of Pittendrum, bought by Philorth from the said Wm. Gray; which being, then they must have retention and compensation of this sum in their own hands, till the pursuers perform to them such deeds as the said William, (in whose right they are come,) stood bound by the contract of alienation of these lands to do, viz. to purge one Ramsay's inhibition, to procure a valid renunciation of my Lord Newbyth's comprising, &c. which incumbrances being cleared, he is content to pay the said superplus, conditioned to be retained by him in the mean time.

ANSWERED,—Though this retention would have met Wm. Gray the defunct, if he had been insisting on this bond; yet the same can in no law be obtruded to thir pursuers, who in effect are singular successors to him, and his Majesty's donatars, who pays no debt, neither acknowledges any creditors.

REPLIED,—The king succeeds two manner of ways, *vel ex delicto vel ex caduco*; if *ex delicto*, then indeed he pays no debt; but where he succeeds *ex caduco*, (as in the case where he is *ultimus hæres*,) then *hæreditas transit cum omni onere*;

and as he has *commodum*, so he grudges not to take the *incommodum* with it. And this is now above all controversy, the Lords having found in this same very declarator of the Earl of Hadington's gift, and in a pursuit by Provost Gilbert Gray against the said Earl, for payment to him of some sums justly addebted to him by the defunct, (both which *vide apud me* in my collection out of the register of decreets; the one is at the 21st January, 1664, and the other at the 20th January, 1665,) that the donatar in such cases must be liable to all the lawful creditors of the defunct; especially considering that the said Earl, author to thir pursuers in their right, either by his back-bond, or by an act and ordinance of Exchequer, was bound to satisfy the defunct's creditors by assigning them to so much of the bastard's estate as would do the same; only the Lords declared he should not be liable *ultra vires hæreditatis*, and that his own estate should be free thereof.

DUPLIED,—It is confest, the Lords after very contentious debate in that cause, did find that a donatar of this kind must pay debt *secundum vires hæreditatis*; so that it would be very relevant to elide this pursuit, if Salton had any bond or other liquid debt owing to him by the said defunct Gray, whereon he sought compensation; but it is altogether against law and reason that he should seek to compense his own clear liquid bond with such illiquid facts, *de quibus non constat* whether they incumber the land or no; so that all that in form and justice can be done here is to decern the bond to be put to execution, reserving to Salton his declarator against the pursuers, for fulfilling to him the deeds wherein Gray stood bound to him, and which he would make to be the pretence of a retention; and to purge the lands of the said inhibitions and apprisings.

To which it was TRIPLIED,—The pursuers in no reason can be in a better case than the defunct Gray would have been in; but *ita est* he would have been forced to perform these obligements ere he could have sought this money; *ergo*, next they have a declarator depending for fulfilling these obligements granted by the defunct.

The Lords found the pursuers behoved to fulfil the defunct's deeds ere they could obtain sentence on this bond; whereupon a day was assigned them for doing thereof.*

Advocates' MS. No. 168, *folio* 98.

1671. *June* 13. Anent the EXECUTION of an ARRESTMENT.

A MESSENGER employed to use an arrestment, in the subscribed copy he gives to the party in whose hands he lays the arrestment, mentions only 1000 merks; in the execution he gives to the party at whose instance the arrestment is made, he sets down 2000 merks less or more arrested by him in such a man's hands. Seeing there is here a discrepancy between the copy and the execution; *quæritur*,

* *At bona cum sua quodammodo causa a fisco erunt vindicanda l.* 17, *p.* 5to. *D. ad Senatusconsultum Trebellianum. Vide infra, No.* 288, and Vandus there cited. *Vide* Craig, *page* 255; *and* Harprechtum *ad principium Tituli Institutionum, de hæreditatibus quæ ab intestato, numero* 510.

if it would not be a good reason for reduction of the arrestment for any farther sums than what are expressed in the copy; and whether the copy or the execution would rule one another here? I think the copy; for I put the case, the person in whose hands the arrestment was laid paid the superplus to his creditor; sure it would be very lawful for him to do it, since it was not arrested; and yet this could not be if the execution were the rule; but if they be yet in the debtor's hands unpayed, I think the Lords will make the execution the rule, unless he offer to prove it.

Advocates' MS. No. 170, *folio* 98.

1671. *June* 13 and 14. FORREST *against* CLEILLAND and OTHERS.

June 13.—This is an action for abstracted multures. ALLEGED for Cleilland, —No process against him and his tenants, because he was never thirled to the pursuer's mill. ANSWERED,—Ought to be repelled, because *in anno* 1619, (the mill then belonging to the Earl of Lauderdale,) Cleilland's lands, with the consent of the possessors and tenants, were thirled by an act of the Baron's Court. REPLIED, —Whatever act was then made, it cannot prejudge him now, in respect thereafter he got from the said Earl a feu charter of the said lands, which charter bore an express clause *cum molendinis et multuris;* by which deed he was clearly liberated, and the servitude of thirlage discharged. DUPLIED,—That *in anno* 1619, when the thirlage was constituted by an act of Court, the Earl was heritor both of the mill and of this piece land now belonging to Cleilland. Some time after he feued the mill to this pursuer's predecessor, with its haill thirlage; then he feued out that piece land now bruiked by Cleilland; will any say, that a charter given by him *cum molendinis et multuris* will take away the prior thirlage in prejudice of me, who, before that charter, had acquired the heritable right of the mill? and though the same person that constitutes the thirlage grants also this charter, viz. the Earl of Lauderdale; yet he gives it not till after he is denuded of the mill, at which time he has no power to grant it. It is out of question but an express or tacit discharge of thirlage by him who constituted the thirlage, (he being still in that same capacity,) will be sufficient; but that is not our case. However, to exeem all scruple, it is offered to be proven, that this defender has been, past memory of man, he and his predecessors, in use to come to this mill by virtue of that act of thirlage. This was sustained as relevant.

Advocates' MS. No. 169, *folio* 98.

June 14.—In the said action it was farther ALLEGED, that the act of the Baron Court being only the deed of the clerk, who needs not so much as be a common notary, could never be a sufficient constitution of his lands being thirled; seeing the assertion of a notary, if the party be not also subscribing, will not bind a man above L.100 Scots; whereas this is a matter hugely above that value. ANSWERED, —Ought to be repelled, in respect of his immemorial possession since the said act. REPLIED,—Possession can never fortify the said act; seeing whatever use and custom they have been in of coming to this mill, the same was altogether voluntary, and so cannot tie them now unless they please. DUPLIED,—Their

custom of coming to this mill, following upon an act of Court astricting them thereto, which is a legal compulsitor, will never be reputed a voluntary act, but must be presumed to be in obedience to that legal compulsitor.

The Lords sustained the act and possession following thereon.

Advocates' MS. No. 171, *folio* 98.

1671. *June* 14. Anent Adjudications.

Found that as it is a nullity in a comprising to be led against one that stands not infeft; so *pari ratione*, adjudication must be null if deduced upon a renunciation of one who is lawfully charged to enter heir to him who cannot be instructed ever to have been infeft.

Advocates' MS. No. 172, *folio* 98.

1671. *June* 14. Count and Reckoning at the instance of an apparent heir.

An apparent heir having intented a summons of exhibition *ad deliberandum*, as also a declarator of the extinction of an apprising, led many years ago, by intromission with the mails and duties within the years of the legal, which last would resolve in a count and reckoning, it was alleged,—That such an action could never be sustained at an apparent heir's instance, and that it was altogether a novelty. Answered,—That whatever was the reason for sustaining exhibitions *ad deliberandum* at the apparent heir's instance, the same very reason militated here for the sustaining this action of count and reckoning, because *non constat nisi ex eventu litis num hæreditas erit damnosa necne;* and for the objecting it is a novelty, that is altogether false, seeing Durie has some practiques of it either the very same or very contingent. *See Dury, 16th March,* 1637, *Home* against *Blackader; 25th February,* 1637, *Hepburn. Vide contrarium 16th March,* 1637, *Edmondstone; item 11th February,* 1635, *Muire.*

The Lords ordained the practiques to be produced, and inclined exceedingly to sustain the summons.

Advocates' MS. No. 173, *folio* 98.

1671. *June* 14. Lord Lovat and Lord Kintaill *against* The Lord Macdonald.

This was an action for count and reckoning upon the act of Parliament 1661, against a proper wadsetter, for repayment of the superplus of the mails and duties of the lands given in wadset, more than will perfect the annualrent of the sum whereon the wadset is made redeemable. This was a piece of land wadset near

seven score years ago, by one of my Lord Lovat's predecessors, to whom he instructs himself to be heir by progress, by production of retours lying in the process; and the right of this reversion he had assigned to my Lord Kintaill, Seaforth's eldest son; whereupon arose the first dilator, no process at Kintaill's instance, because no assignation produced.

ANSWERED,—They insisted then for my Lord Lovat. Then ALLEGED, no process at Lovat's instance, because the method prescribed by the said act of Parliament, whereon the summons is founded, was not kept, in so far the debtors thereby are ordained to offer sufficient security to the wadsetter, for payment to him of his annualrent during the not redemption, before the creditor-wadsetter be obliged to renounce his possession; or if he choose rather to retain the possession, then to restrict himself to the annualrent of his money, and be accountable to the debtor for the superplus; but *ita est* this was not used; *ergo*, he cannot count for the superplus; and as to that pretended instrument whereby, in 1661, M'Donald is required to renounce his possession of the said wadset lands, it is so defective, and so full of nullities, that no weight imaginable can be laid thereon; for 1*mo*, It makes no mention of any procuratory produced from my Lord Lovat. 2*do*, It is made at his dwelling-house; whereas it is offered to be proven, that at the time of the date of the instrument he was out of the country, and so it should have been done by letters of supplement. 3*tio*, There is no security offered, but allenarly a bond subscribed by this Lord Lovat and his curators, (for he was then minor;) which was nowise sufficient security, which is mentioned in the act of Parliament, being in effect no more nor what he had before, seeing this Lord Lovat was heir to his predecessors, and so, *eo nomine*, was bound to him already; neither will any man in sense or reason esteem a minor's bond, with consent of his curators, (being subject to revocation and nullity on that head,) sufficient security. 4*to*, The said instrument is yet null, in so far as it not only requires my Lord M'Donald to quit the possession of the wadset lands, but even to quit his real wadset right itself, expressly contrary both to mind and tenor of the said act of Parliament. 5*to*, *Esto* he were liable to count for the superplus, yet in effect there would be none; seeing, by the same act of Parliament, all losses and public burdens, as quarterings, cesses, waste lands, depredations, &c. which the wadsetter-creditor can instruct he has sustained, must be allowed to him; which being allowed, there will be no remainder, because it is notour how great a sufferer the defender in the late civil commotions was. The first two of consent went to interlocutor. To the *third* it was answered, that there needed not sufficient caution to be offered, but *quævis interpellatio satisfacit actui*, since it requires only caution in the general, without condescending. *Item*, The said act 1661 being a correctory law, it should not be ampliated in these things, wherein it is exorbitant from the common law. 2*do*, His own bond was very good surety, seeing he offered to infeft him in five or six score of chalders of victual he had beside. To this it was answered, This yet made no security, because it was all apprised from him. *Vide 7th Feb.* 1679. To the *fourth*; It must be imputed to the ignorance of the notary, and so must not prejudge me. To the *fifth*, M'Donald must condescend upon such losses, in the terms of the act of Parliament, as, *communibus annis*, made him that he received not the annualrent of his money, else he says nothing; but for this wadset, the same is so advantageous, that when his just losses that he can qualify are allowed him, there will be a considerable excrescence above the annualrent, as it is restricted by law to six *per cent.*

For the first two points, the same being reported, the Lords found, that the instrument was not sustainable, unless the pursuers would produce a procuratory granted to the requirer for that effect; as also, offer them to prove that the time of the said instrument he was within the country, seeing, if he had been furth thereof, he should have raised letters of supplement.

Advocates' MS. No. 174, *folio* 99.

1671. *June* 16. THOMAS CRAWFURD, merchant, *against* JAMES HALIBURTON, sometime of Innerleith.

IN this action, FOUND that the reason of interdiction could not be received by way of exception, suspension, or reply, against a bond pursued or charged upon, but only by way of action of reduction. Also found, that an interdiction *sine causæ cognitione*, whether the party interdicted be *satis rei suæ providus* yea or no, is very quarrellable, as tending to defraud the king's lieges thereby. (See *Durie, 7th July* 1625, ——— against *Shaw.*) *3tio*, Found that an interdiction was a preservative from dilapidation of the heritage only, and nowise hindered a creditor contractor after the same to use what personal execution he pleased, nor to affect his moveables by poinding, arrestment, or otherwise; in this being altogether like an inhibition, which holds fast the heritage; but though there were a thousand inhibitions before my debt, they will not debar me from personal execution, nor from paying myself by his moveables the best way I can; neither is the case of a person interdicted the same with the case of a minor granting bond to his enorme lesion, (though it was alleged to be the same,) who, upon minority and lesion, can annul the bond as to all intents and purposes, so that no execution, neither personal nor real, neither against moveables nor heritage, remains; *ergo*, the same must be in an interdiction. 1*mo*, This is to dispute against principles never so much as controverted before. Next, the reason why a minor gets a total restitution against deeds done by him in his minority inconsiderately, and to his prejudice, is because of an express law so commanding, which fails in the case of an interdiction. The bond charged upon was granted by the defender to Francis Cathcart, one of his interdictors, and was assigned by him to this pursuer, which I think lessens the faith of the *bond exceedingly*; yea, I am of the mind that such bonds should not at all be tolerated. See Craig, page 106, complaining exceedingly.

Advocates' MS. No. 175, *folio* 99.

1671. *June* 16. JOHN BROWN, Factor in Edinburgh, *against* THOMAS SOMERVELL there.

THIS is an action pursued before the Town Court. Sir David Inglis in Bordeaux, draws a bill upon Mr. Somervell of 5 or 600 franks, payable to John Brown. This bill being presented was accepted; yet being pursued for the money before the

Bailies of Edinburgh, his defence was this, That with the bill he received *likewise* a letter of advice from Sir David, bearing that he needed not scruple to answer the said bill, in respect he would send him a parcel of good and sufficient wines, that would do more than repay him his money disbursed by accepting this bill; which was the sole motive that induced him to accept the bill. But the wines being now come home, there being nothing more rotten nor insufficient than they; and, therefore, since the only cause of his accepting that bill, was in hopes to have got good wines, which failyeing, he must be freed of the bill, at least of so much thereof as must in reason be abated of the price of the wines, by reason of their utter insufficiency. The Bailies not laying great weight upon this, Somervell advocates the cause to the Lords upon this reason, that his defence being *in ipsis apicibus juris*, and founded on the common law, *viz.* on the redhibitorian action *quanti minoris*; and that the bailies though most honest men, yet were not civilians; therefore that the question was altogether proper and competent to the Lords' cognition, and fit allenarly to be decided by them.

This being heard, it was taken to interlocutor to the Inner House; where the Lords found it was no good ground of an advocation, and therefore remitted the cause again to the baillies, *et merito*.

Advocates' MS. No. 176, *folio* 99.

1671. *June* 16.

THIS day my Lord Halkerton intimated to the advocates and clerks, that the Lords would receive no reports into the Inner House, except they were brought in the very next day after the Lords' answer was craved thereupon: and this, in respect, they found these reports being brought in unduly, consumed much of their time.

Advocates' MS. No. 177, *folio* 99.

1671. *June* 22. LORD BALMERINOCH *against* ———.

A MAN grants an infeftment of annualrent, which he appoints to be uplifted out of two tenements of land, whereof he had several seasines, and of both which he was heritor. The creditor is ever in possession, use, and custom of uplifting his annualrent out of one of these tenements, and never out of the other; for though the *duo tenementa diversa* were *aliud et aliud corpus* in themselves, yet as to the *jus pignoris* constitute therein to the creditor, that was indivisible, and so it was in his option to betake himself either to the one tenement or the other. Thereafter the common owner of both the said affected tenements, sells them to sundry persons, and the right of that tenement out of which the creditor was in use to uplift his annualrent for the space of sixty years and upwards, comes in the person of the Lord Balmerinoch, who pursues the heritor of the

other tenement, (which was also bound by the first original infeftment of annualrent,) to relieve him of the half of the said annualrent.

EXCEPTED,—He can never be made liable for the half of the said annualrent, because he has brooked and possessed his tenement these forty years and more, free of the said annualrent, and so has prescribed *liberum tenementum*.

ANSWERED,—He cannot be heard, because in all law and reason, the creditor's possession by uplifting his annualrent out of the other tenement, must be interpreted to retain to him his possession of this also, and so interrupt the running of prescription.

REPLIED,—*Esto* it were granted that prescription will not run against the creditor, so as to impede him, though after an hundred or two hundred years, to come back upon that tenement, though all the while he should have lifted nothing furth thereof; yet the case must not be reputed the same with a conjunct debtor, and to give him the power, after forty years that I and my tenement have been free of him and of any others, and so prescribed *immunitus*, to seek his relief of me; *vide supra, No.* 136, [21*st February* 1671.]

The Lords not the less found that he was liable in relief, though he had been able to say free for an hundred years together; and that he could lay no claim to prescription, because the use of payment out of the other tenement, as being a part, interrupted the prescription *quoad* the whole. This was thought a very hard interlocutor, and dangerous, *nec transit quidem mihi absque difficultate; see* 20*th July*, 1658, *Nicholsone* contra *the Laird of Philorth*. *Item servitus* is a *res meræ facultatis quæ numquam præscribuntur*.

The Lords found that tenement which was all the while free, would be bound to relieve the other tenement, for a proportional part conform to the value of that tenement, being compared with the tenement that bore the burden. See a parallel case, 6*th November* 1678, *Hay and Milne*.

Advocates' MS. No. 178, *folio* 99.

1671. *June* 22. Anent DISCUSSION.

A CAUTIONER in a testament being convened to make the confirmed goods forthcoming; it was excepted, that our law allowed no other action against such a cautioner, but only *in subsidium*, the executor being first discussed. *Infra No.* 432, [*December* 1673,] and 191, [30*th June* 1671.] ANSWERED, he confessed it was so, and therefore he had discussed him by obtaining a decreet *cognitionis causa* against the principal, in regard, he having been charged to enter heir, he had renounced. REPLIED, This is not a sufficient discussion, seeing he must not only be discussed in his lands and heritages, but also in his moveables, by poinding, arrestment, and otherways *usque ad peram et sacculum*. And it was remembered, that the Lords had found in a debate in the Inner House, an heir of line was not sufficiently discussed, (the defence was proponed by the heir of tailyie,) because they had done no diligence for reaching his heirship moveables: and though it was alleged, that moveables in respect of their uncertainty, and that they might be darned and carried from hole to hole, needed not to be discussed;

yet my Lord Castlehill inclined to refuse action against the cautioner, unless they should discuss both the moveable and real estate of the principal debtor.

Advocates' MS. No. 181, *folio* 100.

Anent Jus Relictæ.

1671. *June* 22, and 24. ——— *against* ———.

June 22.—A WIFE pursuing for the third of the moveables, It was ALLEGED,—They behoved to have compensation, in so far as they offered them to prove, that in her husband's time she intromitted at her own hand *inscio marito* with such and such goods and gear, and disposed on them, and made use of the price which was never *in rem mariti versum;* and therefore these goods must be imputed to exhaust her third *pro tanto*, especially considering that this defence is founded on that same individual reason, that *actio rerum amotarum* is in the civil law. ANSWERED, that whatever intromission she had with her husband's goods in his lifetime, can never be ascribed in satisfaction of third, or any thing else she can claim to by decease of her husband; because, being in the eye of her husband, it must be presumed to have been with his consent; and they might as well make her liable, and fix a passive title on her for intromitting in her husband's time as do this: both which are such novelties as I believe neither of them were ever heard at this bar before.

They were to have the Lords answer thereupon, *infra No.* 182.

Advocates' MS. No. 180, *folio* 100.

1671. *June* 24.—IN the foresaid cause at the 22d of June, No. 180; taken to interlocutor, the Lords found intromission by the wife *stante matrimonio* not relevant, unless they would say she was thereby *locupletior facta;* that she conveyed her husband's means, and took bonds therefore in her own name, and applied them to her own use, and so benefited herself to her husband's prejudice.

Advocates' MS. No. 182, *folio* 100.

1671. *June* 29. Anent Extracting Decrees of Inferior Courts.

WHERE a decreet of an inferior court, as the commissary's, sheriff's, &c. is suspended, the charger needs not extract his decreet, but only produce the said inferior judge's precept for instructing his charge, if the sum contained in the decreet be within L.40; but if it be above that sum, then he must produce the decreet itself, and the precept will not instruct the charge.

Advocates' MS. No. 183, *folio* 100.

* See Petrus Peckius *de testamentis conjugum, Libro* 2, *Cap.* 6. *Per legem* 51 *D. de donationibus inter virum et uxorem*, the law honestly presumes all the wife's acquisitions to be *ex re mariti ad evitandam turpis quæstus suspicionem.*

1671. *June* 29. Anent Presumption of Death.

An allegeance of death of one that is known to have been out of the country, being admitted to probation; *quæritur*, I producing his wife's contract of marriage with another man, if that will be reputed a sufficient probation that he is dead? I think it will, providing always the wife has used the solemnities appointed in such a case by law, *viz.* waited seven or ten years without hearing from him; then caused cite him at the market cross of Edinburgh, Pier and Shore of Leith on sixty days, which being elapsed, then got a declarator of his death; after which he will be reputed dead, though *in rei veritate* he may be yet in life. But if it be malicious desertion, then not this method, but the order prescribed in the 53d act of Parliament 1753, is to be observed.

Advocates' MS. No. 186, *folio* 100.

1671. *June* 30. Anent Advocations.

My Lord Gosford refused to advocate a cause from an inferior judge, upon the reason of iniquity committed by him; because, before the intimation of the advocation, litiscontestation was made, and they had no reduction thereof; so that he found in such a case, the act of litiscontestation must be reduced. *De hoc cogitandum.*

Advocates' MS. No. 187, *folio* 100.

1671. *June* 30. Anent Actions of Declarator.

A donatar to an escheat having cumulated both his general and special declarators in one summons, the Lord Gosford refused to decern in the general, and make an act in the special *simul et semel*, (though Hope tells that as the practice of his time;) but decerned in the general, and ordained them to enrol of new for the special.

Advocates' MS. No. 188, *folio* 100.

1671. *June* 30. Anent Denuding of Liferent by Consent to alienate.

Found that a woman's consent to an alienation of lands provided to her in liferent, prejudges her not thereof, because a renunciation is the only *habilis modus* for denuding her of her right; far less then will a consent given by the hus-

band to a disposition of his wife's liferent lands belonging to him *jure mariti*, be interpreted a passing from the liferent, or a discharge thereof.

Advocates' MS. No. 189, *folio* 101.

1671. *June* 30. Anent COMPETENT AND OMITTED.

COMPETENT and omitted fails, 1*mo*, where the defences are difficult, and the cause was before an inferior judge; 2*do*, where it was in a suspension, unless it was of multiplepoinding, because a man may suspend oftener. This is now altered by the Lords' decisions, see *alibi*, providing they be new reasons not proponed in the former; neither will one be admitted to allege that they were competent in the first suspension, but there omitted. *Vide supra No.* 49, [1*st July* 1670;] *infra* 484, [*Wright* against *Sheill, June* 1676.]

Advocates' MS. No. 190, *folio* 101.

1671. *June* 30. CUTHBERTSON *against* WILLIAM CUNYGHAME.

IN Cuthbertson's case against William Cunyghame, (the informations whereof I have beside me,) the Lords found this allegeance relevant to liberate from intrusion and spulyie, *viz.* that the defender entered to the house alleged intruded into, and wherein the goods spulyied were lying, by warrant from pursuer's wife, (he having only right thereto *jure mariti*,) she delivering to him the keys thereof, and setting to him the house at the just avail, so that she was *utilis negotiorum gestrix*, and did her husband's affairs profitably; and that this might be proven, *prout de jure* or by the wife's oath, which may be taken in prejudice of her husband, when it is *ad distractum*, and to liberate another *a spolio*, but not *ad contractum* or to burden her husband with a debt: neither did they regard whether it was done by order and warrant from her husband or no.

Advocates' MS. No. 192, *folio* 101.

1671. *June* 30. Anent LIBERATION OF A CAUTIONER IN A SUSPENSION.

WHERE a decreet suspended is turned in a libel, if the defender be unwilling to debate presently, then he will get up the instructions and verifications of that decreet to see, as if it were in an ordinary action; and the cautioner in the suspension will be freed.

Advocates' MS. No. 193, *folio* 101.

1671. *June* 30. JOHN SYM *against* HELEN HAMILTON and CLEILLAND.

IN John Sym's business against Helen Hamilton and Cleilland, the Lords refused to repone them against a decreet, though given in absence, unless they could sufficiently purge their contumacy, albeit they offered to pay large expenses to the charger, and all his other damage; and that because there was no reduction. It was only in a matter of 50 merks. The Lords used not to be so nice in reponing against such decreets, especially all charges being refunded.

Advocates' MS. No. 194, *folio* 101.

1671. *July* 1. LORD LAUDERDALE and the KING'S ADVOCATE, *against* JAMES TENNENT and WILLIAM BROWN.

THERE is an improbation intented at the instance of my Lord Lauderdale as secretary and the King's advocate, against James Tennent and one William Brown, for improving the signet of a horning as false, counterfeit, and feigned, it not having been presented on the day it bears to have been signeted; neither is there any minute of it in their register; nor is it John Robisone's hand writing. William Brown is made assignee to the charge, and he compears and abides at it in thir terms, not that he will assert the truth of its signeting, but only as to him, *et modum quo ad eum pervenit, viz.* that it was delivered to him so signeted; that it was written in Mr. Archibald Nisbet's chamber; that it was taken out there unsigneted by John Lockhart of Bar, (who seems to have been the counterfeiter of it,) and then delivered by him signeted, to one Crawfurd a messenger, who delivered it to this Brown assignee. This deposition was subscribed by him and my Lord Gosfuird.

Advocates' MS. No. 195, *folio* 101.

This following decision was so found, contrary, to the express words of the act of Parliament; because, forsooth my Lord Advocate asserted the meaning of the Parliament to have been so at the time it was made.

1671. *July* 4. LAIRD of BALFOUR *against* LORD AIRLIE.

THE Lords *in presentia* found, that the computation in comprisings *ad hunc effectum*, to know whether they be within year and day of the first effectual comprising, (which is the standard to all the lave,) must be reckoned from the date

of the said first comprising, and not from the date of the infeftment following thereupon, though it may be alleged that by the very words of the act of Parliament in 1661, it is not an effectual comprising till seasine follow thereon, at least a charge against the superior; [*28th January* 1671,] *vide supra numerum* 116. *2do*, That the bringing in of creditors within year and day is most favourable, and *favores sunt ampliandi, vide 27th July*, 1678. This was betwixt the Laird of Balfour and my Lord Airlie.

Advocates' MS. No. 196, *folio* 101.

1671. *June* 30, and *July* 5. Anent Discussion.

June 30.—A relict being pursued as executrix to her husband, who was cautioner for a curator in the act of curatory. Alleged, 1*mo*, That her husband being but a cautioner for a curator, the most that was granted against him by law was a subsidiary action, the principal being first discussed; which method they had not observed, *ergo*. To this it was answered, That he had convened the principal and obtained a decreet against him. Replied, A decreet is not sufficient discussion without horning, denunciation, poinding for moveables, and apprising for heritage. Duplied, Though that was ordinarily requisite, yet a decreet was sufficient here, in regard the principal was notoriously bankrupt the time of the decreet; and it cannot be condescended on that, either at that time, or before, he had any goods or gear; *quorsum* then should we do farther diligence?

My Lord Gosford would not find a decreet sufficient discussion, unless he would say he was notourly bankrupt, either because he had a *bonorum*, or because he was at that time lying registrate at the horne, and so the king's rebell at whatsoever persons' instance, and though the year and day was not run. If this only makes a bankrupt *non est certi juris*. *Vide infra, No.* 281, [*Eleis and Wishaw, 5th December* 1671.]

2do, Alleged,—That as executrix to her husband, she could never be liable to fulfil any of his obligements or debts, because she was confirmed executrix as creditrix to her husband upon her contract of marriage, and so was not countable to any other for her intromission. Replied, If she had confirmed no more than what precisely paid herself, then he confessed she could be liable to none; but the truth is, she being creditrix only for L.1400, she had confirmed near L.3000 of her husband's goods, and so must be countable to him for the superplus. Duplied, If she have uplifted any more than what paid herself, then it is just she should count therefore: but *ita est* she has meddled with no more, (whatever she confirmed,) than what paid herself, and all that in law or reason she can be decerned to do, is *cedere actionem*. Triplied, An executor creditor confirming more than his sum, ought and should do diligence to recover the whole, else he might suffer the superplus to perish, and none else could have a title to intromit therewith, which were a very dangerous preparative.

Gosford inclined to find them bound no farther but to assign the action; yet on Mr. David Falconer's consigning an amand, he gave him the Lords' answer. *Vide 20th November* 1678, *Lundy and Wishaw*. *Vide supra, No.* 181.

Advocates' MS. No. 191, *folio* 101.

1671, *July* 4.—In the foregoing case about the executor creditor's diligence, taken to interlocutor at No. 191; the Lords, because it was a general leading case, ordained both parties to produce practiques anent it *hinc inde*.

Advocates' MS. No. 197, *folio* 101.

1671. *July* 5. PROCESS.

A CERTAIN person pursuing on a bond for payment-making to him of the sum therein contained, and the annualrent thereof from the date. Against which it was ALLEGED, No process for the annualrent, because the bond bears none. REPLIED, Though it bears no annualrent, yet shortly after its date, the debtor being charged, he was denounced and registrate at the horn; from which time he must be liable to the creditor, now pursuer, in annualrent. DUPLIED, This is noway receivable by way of reply; but in all form and justice he should have libelled thereupon, and given out the horning with the process as one of its instructions, and *in modum tituli*. Craigie inclined to sustain it by way of reply; but I observed Sir G. Lockhart and the most learned in the house, to differ from him therein.

Advocates' MS. No. 200, *folio* 102.

1671. *July* 5. HEW DALLAS KENNEDIE, Sheriff-Clerk of Aberdeen, &c. *against* SIR GEORGE MACKENZIE of Tarbet.

HEW DALLAS KENNEDIE, sheriff-clerk of Aberdeen, &c. having charged Sir George Mackenzie of Tarbet, to make payment of 20,000 merks conform to his bond. He suspends upon this reason, that the bond was conditional, *vis.* if the gift of Innerallochie's ward and marriage, (the right whereof he had acquired from this pursuer,) should prove effectual and profitable to him; but *ita est*, this condition was never purified; but to the contrary, a second donatar to the said ward and marriage *in foro contentioso*, was preferred.

ANSWERED,—They confess the condition; but Tarbet *in quantum lucratus est* by that gift must be liable to the pursuer: but so it is, by that decreet of preference, there is 5000 merks appointed to be paid to him out of the said ward by the second donatar, and that in consideration of his gift: *ergo*, his bond must stand good against him as to that 5000 merks, and the pursuer is content to restrict it thereto.

REPLIED,—The bond can never subsist *quoad* that 5000 merks; because expressly by the decreet it appears to have been granted by the Lords, in respect of the vast expenses Tarbet was at in defending the plea against the said second donatar; and so in effect he had no benefit by that gift.

DUPLIED,—He can never be heard to impute the said 5000 merks as the re-

imbursement of his expenses; because by his bond charged upon, he is bound and obliged to perfect the said gift on his own charges.

The Lord Craigie inclined to find, if Tarbet had uplifted the said 5000 merks, then to decern him in repayment thereof to this pursuer; but if it was yet in the debtor, *viz.* the second donatar's hands, then reserved action to the pursuer against him as accords.

Advocates' MS. No. 202, *folio* 102.

1671. *July* 5. LAURENCE PARK *against* ELIZABETH BINNIE, Relict of MR. LAURENCE SCOT.

ONE Laurence Park, pursues Elizabeth Binnie, relict of Mr. Laurence Scot of Bavillaw, one of the clerks of Session, by way of declarator, to hear and see it found and declared that it was Mr. Laurence his mind and intention to settle the fee of a sum contained in a bond granted to him by ——— on the said pursuer as his godson. The acts out of which he elicited his intention, were these, 1*mo*, That in his lifetime, before famous witnesses, he declared the right of that sum belonged to Laurence Park's father; 2*do*, He ordered a writer to draw an assignation to the said bond, to be given by him to the said Laurence; which, though it was never subscribed, yet having died suddenly, it was found amongst his papers, and it was a thing he was minded to do. 3*tio*, They referred it to the relict's own oath, that it consists in her knowledge, that it was her husband's firm resolution that this sum should belong to this pursuer, with sundry others.

My Lord Craigie was content to give them the Lords' answer thereupon; who, before answer, ordained all writs that might anyways clear the trust and Bavillaw's intention, especially the said unsubscribed assignation, to be produced.

Advocates MS. No. 205, *folio* 102.

1671. *July* 7. MURDOCK *against* SIR ANDREW DICK.

SIR Andrew as administrator of the law to his son William Dick, sells a tenement of land to one Forester, and he to Murdoch. Sir A. is obliged to warrant this right at all hands, and to procure his son's ratification at his majority. Sir A. and his son altogether disagreeing, he was so far from procuring his son's consent, that his said son has intented action of reduction of this alienation made by his father in his nonage to his prejudice. Murdoch finding his right thus drawn under question, intents a summons against Sir A. for warranting him, and for obtaining his son's ratification.

Against which it was ALLEGED,—That Sir A. could never be decerned to warrant till there were a distress; but *ita est* there is no distress condescended upon, save only a naked citation given by Sir A.'s own son to this pursuer for reduction of his right; which, till decreet follow thereon, can never be the ground of an action

for warrandice; because *nondum constat* whether he will evict or not, or how much, whether it will be in whole or in part; and till the *quantum* be known, there can be no warrandice decerned, because that must be proportionate to the eviction.

To the next, anent the obtaining his son's consent; that is *factum speciale et quidem alienum*, and in the condition he is now stated with his son, altogether unprestable by him; so that in law *non tam præcise tenetur* for performance; but all that can be sought of him is *damnum et interesse*, sustained by them through his not obtaining his son's ratification, which how soon as they liquidate it, he is content to pay.

This was found relevant. And because my Lord Craigie inclined to sustain this action, at least *pro declaratoria juris*, in case Mr. Dick prevailed against Murdoch in his reduction, it was urged, that such a sentence being general would be altogether useless and insignificant; and that warrandice upon eviction being *actus legitimus*, it neither admitted *diem* nor *conditionem*. And caution being craved of Sir Andrew, it was judged by some very unreasonable till the distress were manifest.

Advocates' MS. No. 207, *folio* 103.

1671. *July* 8. The COMMISSARIES of Edinburgh *against* The SHERIFF and his DEPUTES.

THE commissaries of Edinburgh, and the sheriff and his deputes falling in contest about that seat in the north side of the hall, each of them laying claim thereto as their own; and the matter being brought before the Lords by a bill given in by the commissaries; the Lords found, that before the building of the Parliament house, they had different seats, and that they so continued till both the offices came to be in person of one, viz. of Claud Hamilton, in the beginning of the English, who having done with the one Court, sat still and keeped the other; and that sinsyne the sheriff deputes have used that seat through tolerance from the commissaries; and therefore find they may either take their own way for getting a new seat; or if they please they may sit down and hold their court at twelve o'clock when the commissaries are up. If there had been an active sheriff, (he being both far more honourable and far more ancient than the commissariot,) it may be thought he would not have lost the interlocutor.

Advocates' MS. No. 208, *folio* 103.

1671. *July* 8. Anent GIFTS of ESCHEAT.

A LORD of regality having gifted the escheat of one who lived within the regality, and the donatar seeking general declarator; it was ALLEGED,—The gift is null; because the person was denounced and registrate at the horn before the erection of the regality; and so that escheat belongs to the king, and not to the

Lord of the regality; unless he can show where the erection gives him a special right, not only to escheats that should fall thereafter, but to all bygone escheats not yet gifted by the King's Majesty. ANSWERED,—This escheat must fall under his erection, though general; unless they could say gifted before.

Then ALLEGED,—The denunciation was null, because not used at the head burgh of the regality. ANSWERED,—He could not do that, because at that time there was no regality.

Craigie inclined to find he had no right to bygone escheats, except it were expressed in his erection.

Advocates' MS. No. 211, *folio* 103.

1671. *July* 8. Anent PASSIVE TITLES.

ONE being pursued *super titulis passivis* to pay a debt owing by his father, he alleged absolvitor from the titles as heir, successor *tit. lucrativo*, lawfully charged to enter heir, or gestion *pro hærede*, and such like; because he offers him to prove he had an elder brother in life who would only be heir, *et adhuc vivere præsumitur, nisi mors allegetur*. ANSWERED,—They offered to prove he was killed at Chattam.

This was found relevant; and the Lord Craigie declared he needed not adduce witnesses thereon, but that *testimonia* might suffice in this case.

Then craved absolvitor from that vitious intrommitter, because offered to prove there was an executor confirmed; as also absolvitor from that of executor, because they condescended upon another who was executor.

This was found relevant also.

Advocates' MS. No. 212, *folio* 103.

1671. *July* 5, 8, and 11. MAXWELL of Nether Pollock, *against* KIRKCONNELL MAXWELL.

July 5.—KIRKCONNELL MAXWELL being pursued by Maxwell of Nether Pollock upon the passive titles, for payment of a debt owing by his father, and specially on the title of gestion as heir, in so far as he intromitted with the mails and duties of his father's lands; ALLEGED,—That intromission can never infer the passive title of behaviour, because he can ascribe it to a very specious title, viz. to a comprising led against his father, whereof he had acquired the right, and in virtue whereof he intromitted. *Vide infra, June* 1677, *No.* 575, [*Kincaid* against *Gordon, June* 1677.] REPLIED,—This comprising being come in the person of the apparent heir, whether it was led by a conjunct person or no, it must be presumed to have been *in fraudem*, and so will never save from a passive title. DUPLIED,—All that can be subsumed on that act of Parl. 1661, is, that it shall

be leasum to any creditor compriser to redeem it from the apparent heir, upon payment of such sums as he truly depursed therefore; but it is *inauditum* and consonant to no law that an apparent heir intromitting with his predecessor's estate by virtue of a comprising, shall, upon that head, be exposed to all his predecessor's debts; but if they will insist to redeem in the terms of the act of Parliament, they should have an answer.

Halkerton would give them the Lords' answer on it.

Advocates' MS. No. 204, *folio* 102.

July 8.—IN the foresaid cause of Kirkconnell Maxwell's, which *vide supra, No.* 204, the Lords found an apparent heir acquiring the right of a comprising led against his predecessor's estate to be no gestion; whereupon the pursuer offering to redeem the said comprising,—

To which it was ANSWERED, 1*mo*, That this being a comprising led before the act of Parliament, and the right thereof being acquired by him before the making of the said act, it can never fall under the compass thereof; for beside that no act should be extended *ad præterita*, but are made to rule *in casibus futuris*, the said act *per expressum* bears, that whatever apparent heir shall in any time thereafter acquire the right of such comprisings, &c. But, 2*do*, *Esto* it were competent, and after that act, yet it will never be competent *hoc loco;* but they must raise a declarator, wherein it may be found they have right to redeem the said comprising. 3*tio*, They cannot be heard, except they subsume in *terminis* of the act of Parliament that they are comprisers, seeing no others have right to redeem.

REPLIED to this last,—That though the act speaks of creditors comprisers; yet there being that same reason for all creditors, the Lords in equity may extend it; especially considering that the rubric or narrative of that part of the act speaks indistinctly of all creditors.

They were to have the Lords' answer on this last part.

Advocates' MS. No. 210, *folio* 103.

July 11.—IN the case of Kirkconnells, at No. 210, taken to interlocutor, the Lords found, That albeit a personal creditor, who was not a second compriser, could not claim to redeem a prior comprising, the right whereof was now come in the person of the apparent heir, because he had no right to the reversion; yet, that he might offer him to prove, that either the apparent heir had paid no sums of money for that right, or, if he had, the right was now extinct, in so far as he intromitted with as much of the mails and duties of the apprised lands as paid him the sums truly debursed by him; or if there were any part of the said sums yet resting, the said personal creditor might have the liberty to purge the same by paying in the superplus, and so might clear the lands of that encumbrance to the effect he might attain to the mails and duties thereof himself; and this they found they would receive *hoc loco*, and that it needed not a declarator. Yea, some were of the mind, that if he should be found satisfied of the sums really paid him, upon a bill given in by a personal creditor, the Lords would decern him to assign over his right to the said creditor, seeing, in doing thereof, he has no prejudice. My Lord Halkerton also reported, that, (in the question of intromission by an apparent heir with the mails and duties of his father's lands, conform to a comprising whereof he has acquired the right, will infer behaviour yea or no,) the Lords

found it would, if his father, notwithstanding of the said apprising, continued in the possession of his lands to his death, and if the appriser never attained the possession in his lifetime; *sed de hoc multum dubito, nec æquitatem ejus capere possum*; but I think the Lords rather meant it should be a behaviour, if the apparent heir meddled before the establishing a right in his person.

Advocates' MS. No. 213, *folio* 104.

1671. *July* 11. Anent EXECUTION of a SUMMONS.

A MESSENGER'S execution, bearing in the general that he charged the haill within-named persons in the summons, without condescending on their names, will not be sustained, unless he take up his execution, and mend it by inserting *specificè* the names and sirnames of these he charged, and then abide at it.

Advocates' MS. No. 214, *folio* 104.

1671. *July* 5 and 11. MACRAW *against* LORD MACDONALD.

July 5.—IN this action, ALLEGED, 1*mo*, No process; because neither executed personally, nor at his dwelling house. ANSWERED,—Ought to be repelled; because, conform to a warrant and dispensation from the Lords, contained in the summons, he was cited at the market cross of Inverness, as the nearest burgh in the Lowlands, *ob non tutum accessum* that could be had to his dwelling place. REPLIED,—A warrant *non relevat* to sustain such a warning or citation, unless it proceeded on a bill given in to the hail Lords, who, *re cognita*, allowed of the same. (This is the thing the lawyers call *citatio edictalis.)* DUPLIED,—He could never be heard to question his citation, because the sole effect of citation being *ut pars citata certioretur*, it is offered to be proven it came to the defender's notice. Craigie was content to give them the Lords' answer upon this point, whether such warrants behoved to pass on special knowledge of the hail Lords, or if they were sustainable as passing in course.

The Lords found they would sustain them, as they have been used to pass of course in times bygone.

2*do*, ALLEGED,—The citation is not yet lawful, because it bears not a copy to have been left at the said market cross, which is a necessary solemnity, and being omitted vitiates the execution. ANSWERED,—The execution stood good notwithstanding of the said allegeance; because it bears he duly and lawfully charged him; which words, duly and lawfully, presuppose all the requisite formalities to have been used. They were to have the Lords' answer on this also.

The Lords found that they would sustain the execution, if so be the messenger will take it up and mend it by adding these words, that he left a copy of the charge at the said cross, and abide by it.

Advocates' MS. No. 199, *folio* 101.

July 11.—In the foresaid action of Macraw against Macdonald, at No. 199, there was a third point then taken to interlocutor, (which then I omitted,) viz. if the messenger's execution on the first summons should not be sustained, because it wanted these words of a copy left; whether the execution upon the act and letters would be effectual, at least for this, that it would stop prescription, seeing it was given within some very few days of prescription. The Lords found, *esto* the first execution were null, and so that no process could be sustained on the second, yet that the second would have stood good, *ad hunc effectum*, to interrupt the forty years' prescription, and that *qualisqualis insinuatio sufficit in isto casu. Vide* A. Fabrum *in Cod. Lib. 3. Tit. 8. De Litiscontestatione defin. secunda. Vide l.* 13. *D. de Regulis Juris, in secundo sensu prout id exposuit* Bronchorstius. *Vide infra, No.* 285; [*5th December*, 1671,] *et supra, No.* 17, [*Riddocks* against *Sorleys*, 16*th June*, 1679.] *Vide l.* 15. *D. de inofficioso test.*

Advocates' MS. No. 215, *folio* 104.

1671. *July* 12. DOUGALL MACPHERSON *against* MURRAY.

THIS being a competition betwixt two comprisers, it was ALLEGED by Macpherson, that Murray's comprising was null upon four several heads. The first was, that it was led and deduced upon an heritable bond, which was never made moveable; at least, if it was made moveable, it was allenarly by a requisition made to the cautioner; which could never be a ground for a comprising against the principal; and that the comprising behoved yet to be null, because it bore nothing of the requisition at all.

(This apprising was led by one Mr. Thomas Lundie against Sir James Keith's estate of Caddom.)

This being taken to avizandum, the Lords found requisition being made sixty days before a term to the cautioner, (they being all bound conjunctly and severally in the bond,) was a ground good enough whereon the principal's lands might be comprised; as also that the comprising needed not narrate the said requisition; but find they may produce it now; and ordain the other party to see it.

The second nullity was, that it was a comprising led against the heir male, the heir of line not being called and discussed. To this it was ANSWERED, that he was discussed in so far as, he compearing by his procurator in a process intented by the said Murray, a day was taken for condescending and proving what estate belonged to the heir of line, to the effect he might discuss the same; and he failyeing, the term was circumduced against him.

This being also taken to interlocutor, the Lords found this sufficient discussion; and therefore, notwithstanding of the said second pretended nullity, sustained the comprising.

The third was, that the messenger, who was judge to the comprising, had prorogated diet from one day to another; whereas their said diet is ever most peremptory.

The Lords' answer being also sought on this, they found a messenger sitting judge to a comprising was not only sheriff in that part, but also supplied the room of the sheriff of the shire, before whom, of old, all comprisings were led;

and therefore, as the sheriff, who has an ordinary jurisdiction, might have continued the Court, having once fenced it, so might the messenger, as in effect but his depute: and therefore they found his prorogating the day no nullity, unless they would condescend on some pregnant and considerable damage they sustained thereby.

Yet one who will but consider the reason of the 6th act of the Parliament held in *June* 1649, (though rescinded,) will think thir diets peremptory, else there was no need for that act. *Vide* this at more length, [*December* 1674, the same parties,] *infra No.* 452. *Vide supra* 67, [*July* 8, 1670.]

The last ALLEGED nullity was, that it was neither deduced within the bounds *illius districtus et jurisdictionis* where the lands apprised lay, nor within the tolbooth or Session House of Edinburgh, which is *communis patria* to all Scotland, but at Coupar. ANSWERED, That what the messenger did in this was by warrant and express dispensation from the Lords: this past also to interlocutor.

The Lords found that their warrant ought not to be a snare to any of the lieges; and therefore sustained the apprising, notwithstanding it was led neither *infra illum vicecomitatum* within which the lands lay, nor at Edinburgh; yet, in regard of the singularity of this, and the preceding point, about adjourning the diet, the Lords declared they would make an act to be a *caveat pro futuro* how far a messenger's power shall reach in these cases.

There were four great interlocutors. [*See December* 1674.]

Advocates' MS. folio 104.

1670, and 1671. LERMONT *against* the Earl of LAUDERDAILL.

1670. *June* 29.—THE Earl was pursued as donatar to the forefaulture of the Laird of Swinton, at the least, as intromitter with the mails and duties of his lands, to pay this debt, which was contained in the disposition of the estate to that laird of Swinton, in whose place the Earl is come; and so is *debitum fundi et reale*, and must affect the lands.

This pursuit was not sustained unless they would say the estate was burdened with that debt in the procuratory of resignation, and in the infeftment following thereupon.

Act. Spotswood. *Alt.* Sinclair. *Advocates' MS. No.* 45, *folio* 77.

1671. *July* 5.—THE action whereof we have mentioned *supra* at the 45th No. *Lermont* against *the Earl of Lauderdale*, being again called, because they controverted about the scroll of the act: it was ALLEGED that my Lord Lauderdale was liable to satisfy the said debt *super hoc medio*, that he being the King's donatar to the forfaulture of John Swinton of that ilk, he and the King must get the right *prout optimum maximum erat*, and as it stood in the said John's person: but *ita est* in the disposition made by Sir Alexander, (who was John's father,) in favours of John his son, he reserves *in gremio juris* a power to affect and burden the lands disponed with 52,000 merks in what manner he pleased; and thereafter having borrowed from the laird of Smeton, (in whose right Lermont is now come,) 14,000 merks, he declared it was his intention to exercise his power he had

reserved to himself in the disposition he had made, and therefore willed the said sum should affect the lands, and burden his son, conform to the said disposition: and as the said John, if he had not been forfaulted, would never have been able to evade this debt, so neither can the King or his donatar, it being *onus reale inhærens* before the forfaulture, and therefore it must pass *cum onere*. And as to the *facultas* reserved by the father, it is real, and might have been comprised from him at a creditor's instance.

ANSWERED,—That however the laird of Swinton might have been reached upon the said debt, yet my Lord, who is donatar to the forfaulture, and so a singular successor, can never be, unless infeftment had followed upon that bond of Smeton's, and it had become a real right.

They were to have the Lords' answer upon this.

Advocates' MS. No. 203, *folio* 102.

1671. *July* 12.—THE case at No. 203, *supra*, being reported, the Lords found that in the disposition made by Sir Alexander Swinton to his son John, he reserved a faculty for burdening the estate by wadsets, or other infeftments, with the sum of 52,000 merks; and that this declaration, in a personal creditor's bond, That he willed this sum should be a part of the said sum reserved him, was not *habilis modus* of exercising his said power; and therefore assoilyied the King and the Earl of Lauderdale his donatar therefrom, as noways affecting them.

Advocates' MS. No. 217, *folio* 104.

1671. *July* 12. Consent by a WOMAN clad with a HUSBAND.

THIS case being taken to interlocutor, Whether or no a woman clad with a husband the time of the consent, may not reduce a consent, given by her then, to an alienation of her conjunct-fee lands, upon thir common grounds of law, That what she did was through marital reverence *et ex timore*, and that her subscription was *fide implicita*, in so far as they assured her and made her believe that what she was doing redounded noways to her prejudice. This the Lords declared they would hear both parties debate upon in their haill presence, out of the common law, in regard there was nothing yet in our law to be a rule therefore.

Advocates' MS. No. 218, *folio* 104.

1671. *July* 14. Anent EXHIBITION ad deliberandum.

THE Lords found an exhibition *ad deliberandum*, sought by an apparent heir, ought to be sustained only for all writs granted to the apparent heir's predecessor, by whatsoever person; as also for all writs granted by him containing clauses of reversions or other clauses conceived in his favours; and siclike for all writs

granted by him of whatsomever tenor they be, *conjunctis personis*, or to such as were the time of his decease *in familia*; and that farther it could not be sustained.

Advocates' MS. No. 221, folio 105.

1671. *July* 13 and 14. MR. THOMAS BAIRD, Advocate, *against* JOHN INGLIS, Advocate.

July 13.—IN the ejection pursued by Mr. Thomas Baird, advocate, against John Inglis, likewise advocate, for ejecting the said John furth of a dwelling-house pertaining to the pursuer, and possessed these several years by the said John; he having alleged many things, and all being repelled, viz. that he was never warned to remove, but allenarly a woman who sits there by his tolerance; that the decreet of removing was given by the bailies of Edinburgh, who were not Judges competent to any member of the College of Justice; that the pursuer set him a verbal tack, and promised not to bid him flit: which assurances and promises imported at least a tack for a year; and after that, he bruiking by tacit relocation, he behoved to be warned ere he could remove.

This were repelled, because it was answered that the pursuer never set his house to the said John, but only to that woman, so John was only her sub-tenant, so that he had no necessity to warn him but only her; neither made it ought that he paid only the mail and not she.

He at last ALLEGED he had waired sundry considerable reparations upon the house, which were both necessary and profitable, which behoved to be allowed to him ere he could remove. ANSWERED,—What he did of this kind was upon his hazard, unless the landlord had approven thereof, or had promised to refund to him the same: and the most he can seek is, to take the same with him; seeing *qui in rem alienam sciens et sic mala fide impendit, impensas non deducit*. Next, though ye have made it of a newer fashion, yet I like the old way better and will have it so.

REPLIED,—The landlord consented in so far as *scivit, tacuit, et non contradixit*.

The Lords found, if the reparations were necessary, or such as thereby the house might set for more mail, that then he should have *retentionem* vel till the same were repaid to him; and that he was not obliged to remove till that were done.

Advocates' MS. No. 220, folio 104.

July 14.—IN the foresaid case, at No. 220, the Lords ordained the deacon of the wrights, with two other tradesmen, to go in the afternoon with my Lord Colinton and view the house and reparations made thereon, and to report how far they judge the house meliorated thereby.

Advocates' MS. No. 222, folio 105.

1671. *July* 14. LADY CASSILS *against* The EARL of ROXBURGH.

MY Lady Cassils pursuing the Earl of Roxburgh for payment making to her of the sum of 10,000 merks per annum, of additional jointure, over and above the 10,000 merks which was provided to her in her contract of marriage with my Lord Ker, her first husband.

ALLEGED for the Earl, That it was *donatio inter virum et uxorem*, and so was null of the law. ANSWERED, Ought to be repelled, because it was *morte confirmata*. REPLIED, That her husband revoked it in his own lifetime, in so far as by his latter will and testament, he entreated his father would be pleased to instate his wife in a jointure of L.10,000; which must be interpreted an evident revocation of the additional jointure of 10,000 merks, which with her provision by the contract matrimonial made up 20,000 merks. DUPLIED, 1*mo*, The conception of the words will never import a revocation, which ought ever to be clear and expressed. But 2*do*, *Esto*, they did, the Earl can never be heard to found any thing thereon; because it is offered to be proven, that the old Earl, father to her husband, chose rather to ratify the additional jointure, and to secure her therein, than to follow his son's desire in his latter will; and that because he found the first much more easy for him than the last: in regard her additional jointure was not payable till after the old Earl's decease. But for the L. 10,000 spoke of in the testament, it would have been due immediately after my Lord Ker, her husband, his decease: which homologation and election made by the said Earl, *funditus* takes away all revocation if there any was. But to show how square the lady is, she is content to restrict herself to what jointure is contained in the testament, for by that means she will have right to 5000 merks yearly, (which she never got,) for all years intervening between the decease of her husband and her goodfather. Which claim will come little short of what she is now seeking.

The Lords found no revocation.

Then they ALLEGED she had promised never to exact it. Which being referred to her oath, she deponed *negative*.

Then ALLEGED she was paid; this she also denied upon oath.

The Lords repelled all the defences proponed for the Earl, and decerned conform to the desire of the summons.

Advocates' MS. No. 223, folio 105.

1671. *July* 27. Lord RUTHERFORD *against* Captain RUTHERFORD.

IN the foresaid improbation mentioned at No. 101, betwixt my Lord Rutherford and Captain Rutherford, the Advocates in their reasoning entering upon the matter, the Lords ordered Robert Hamilton, macer, to go and bring the defender out of the tolbooth, where he had lain of a long time before, to their presence, in case there should any thing occur whereon he might be interrogated by them. While he is coming over, he pretends there were some papers in Collisten's chamber in Besse Wind which would be of great use to him if he took them with

him, and therefore begged leave to fetch them, and paroled he should presently return. The macer trusting him simply, Rutherford makes his escape; the rumour whereof running up and down the town, Towie Barclay, who was lately but released from his confinement at Glasgow, comes in to the Lords in the Inner House, and proffered to find him out and fetch him again within an hour; which accordingly he did with a great deal of zeal, expressing that he could not abide cheatry by any thing in the world. Such persons know one another's lurking places so well.

Advocates' MS. No. 224, folio 105.

1671. *July.* Anent the sale of the BASS.

IN Andrew Ramsay's business about the sale of the Bass to his Majesty, the King's Advocate was induced to attest the disposition made by the Provost to his Majesty of that Isle, to be a sufficient security, and that the Provost had a valid and good right thereto under his hand; though he alleged it was a thing no King's Advocate ever before him had been in use to do, yet he would say nothing verbally save what he would also give under his hand.

Advocates' MS. No. 226, folio 105.

1671. *July* 27. LADY FINGASK *against* Her CHILDREN and their TUTORS.

IN the Lady Fingask her action against her children and their tutors, she craving the annualrent of the 3000 merks left her by way of additional jointure in her husband's testament:

It was ALLEGED,—The heir behoved to be assoilyied therefrom, because being a deed *in lecto*, and so could not prejudge him.

To this we ANSWERED,—That albeit it was done on deathbed, yet the heir must be liable therefore, because it depends upon an act *inter vivos*, viz. her contract of marriage, by which, acknowledging the provision he had put her in to be mean, he reserves to himself a power at any time in his lifetime, *etiam in ipso articulo mortis*, to burden and affect his heir with what farther provision and additional jointure he shall judge fit; so that what he has done in his testament is only in prosecution and the exercise of this power.

To this it was REPLIED,—That that provision and reservation could never salve it, because it was contrary to a fundamental law, with which none can dispense.

We were to have the Lords' answer on this.

They altogether declined to tell their sentiment thereon: but found if we would still insist to burden the heir with the 3000 merks contraverted, because of the reservation made *inter vivos*, they would hear us in their own presence press that point from reasons *in jure*; but if the lady would insist for it as a legacy to affect the free gear, then they would ordain her to be answered *secundum vires*

inventarii, and to come in with the other legacies *pro rata*. *Vide supra*, *No.* 7, [*Mosman* against *Bells*, *February* 1670,] *and No.* 160, [*March* 1671.]

Sir George Lockhart was of opinion that a man's own private deed was not enough to warrant such dispositions on deathbed. Yet thought if a man had his lands given him by his Majesty's charter, or if he caused insert in his charter any such power, that the same would sustain *quoad* the lands contained in that charter; (which power the Earl of Teviot had.) *De quo multus dubito.* The tutors offered her assignations to bonds for her liferent use; see this repelled *13th February*, 1629, *Cochrane and Dauling.*

Advocates' MS. No. 227, *folio* 105.

1671. *July.*

Vide infra, *No.* 307, some actions and decisions that were in this month of July.

Advocates' MS. folio 105.

1671. *July.* Anent Fidejussion.

About this time a bond granted by a principal and his cautioner was quarrelled as null *quoad* the cautioner, because he had signed it six days before the principal; and it was alleged that fidejussion being an accession and sequel of the principal obligation, (without which it cannot subsist,) it must follow the same and not precede it.

The Lords found whatever subtility was in the Roman law thereanent, yet that the same could never be respected in our cautioners; who differed exceedingly from theirs, and were in effect *correi debendi*, co-principals, bound conjunctly and severally for the debt, and so it was no matter whether they preceded or followed. But the debate ran on a gross ignorance of the civil law; for by it a cautioner may either precede or follow the principal obligation; *L.* 4. *and* 6. *D. de Fidejussoribus*; *par.* 3. *Instit. eodem*; *L.* 50. *D. de Peculio*; *L.* 35. *D. de Judiciis.* And as for the objection that it is a sequel, the same has no weight, because the lawyers make use of a fiction here, by which the accessorian obligation, though prior in time, yet *juris intellectu* is held posterior to the principal obligation; just like a substitution, which will be maintained by reason of this fiction though it precedes the institution of the heir; *l.* 2. *p.* 5. *et* 6. *D. de vulgari et pupillari*; and like to a servitude which may be imposed and constituted on a house not yet built; *L.* 23. *p. ult. D. de servit. urbanorum.* See *annotata* upon the act of Parliament in 1670, about annexing Orkney and Zetland to the crown.

Advocates' MS. No. 228, *folio* 105.

1671. *July.* ANDREW HALDEN *against* NICOL CAMPBELL, stabler.

NICOL CAMPBELL, stabler, being cautioner for Samuel Meikle to Andrew Halden in a bond of L.1900, and being charged thereupon, suspended (as also raised reduction) upon this reason; that the bond can receive execution against him for no more but allenarly the sum of L.1200, because he, not knowing to subscribe himself, gave command to the notaries to subscribe for him as cautioner in the foresaid sum allenarly, of L.1200, and he designed no more; and they have bound him as cautioner in the whole: and this command he offered to prove by the notaries and witnesses inserted their oaths.

Much was disputed against the relevancy of the probation of the reason, tending to take away a bond by witnesses. Yet the Lords having regard to the suspender's illiterature, who could neither read nor write, and that he has been *vir integræ famæ;* before they would give answer to the relevancy, (though they inclined much to sustain it in this *juncto* of circumstances,) they ordained the notaries and witnesses to be examined upon the reasons; as also those that wrote the bond and were present at the communings. Upon whose depositions the bond was restricted, and Nicol assoilyied *pro reliquo.*

Advocates' MS. No. 230, folio 106.

1671. *July.* Anent the DIETS of the SESSION.

ABOUT this time, and after, there was a great rumour about the changing of the diets of the session, by taking away the two months of summer session and adjecting them to the winter, which was thus to sit five or six months together, and all the remanent of the year to be vacancy. Much was pled for the convenience of such an alteration; but if the inconveniences that would ensue thereon be also impartially weighed, in my judgment they preponderate; for *1mo, Omnis mutatio etiam in melius est periculosa, et in rebus novis constituendis evidens et summarum utilitas esse debet antequam recedatur ab eo jure quod diu æquum visum est; l. 2. D. de Constitutionibus Principum;* and our predecessors, who modelled a summer and a winter session, were every whit as knowing and as rational as we. * *2do,* If the session sit down on the 1st of October then ye call in the lieges to Edinburgh in one of the throngest months of harvest that they have, which by law is ever appointed to be feriot time; *l.* 1. *per totum, D. de Feriis; item toto titulo Codice.* And though within these fifteen or twenty years we

* And old customs, like old lived men, are presumed to be of a sound, equable, and wholesome temperament and constitution. By the Town Council books, it appears, in 1680, endeavours were made by some for a change of the Sessions' course, (though I believe not this that is intended now.) The Council writes to Mr. John Hay, their Commissioner at London, to deal with his Majesty to stop the same;—that their being mewed up within town two of the pleasantest months in the year, and in effect that which is all the summer we have in Scotland, is most destructive to our healths, and impedes hugely the improvement men might make of their estates; and those who are at any distance have no benefit of them at all, but must furnish themselves at Edinburgh. Yea, the summer session is the cause of all our prodigality in apparel, house mails, and other ways; yea its abolishment, might be instructed, would be £20,000 Sterling a-year in the lieges' way.—See sixteen reasons against taking away the Summer Session, in a paper beside me, drawn by

have learned from the neighbour English, to labour soon, whereby our harvest is more early than it was wont to be, yet there is no man will deny but the month of October (and this very year is a demonstration of it) wins much of the corns in Scotland. And the like inconvenience shall follow if ye take in the month of March, which is the hottest month for labouring the ground in the year. *3tio*, The weill of the kingdom's metropolis, of the city of our solemnities, must also be here considered, in so far as it draws not with it any considerable prejudice to the rest of the country; and Menenius Agrippa his apologue to the commons of Rome, would be remembered: The rest of the members will not do well to withdraw sustenance from the belly,* upon the envious pretence that they have all their several functions and offices tending to serve it, and that it is idle; for in famishing it, they will famish themselves, and in what proportional degrees it decreases shall they diminish by these same. Edinburgh is the centre where our gentlemen's younger children terminate for education; and by an amicable reciprocation, the circumferences of this centre reach again over all the country; and there be few gentlemen in Scotland who have not some interest therein, either by being issued originally therefrom, or by having some of their twigs engrafted therein; so that it is deservedly accounted the *communis patria* of all Scotsmen; and hence the testaments of all dying out of the country are confirmed there, persons furth of the country are summoned there, and such like. *(Vide infra, No. 387, Kinloch against Ramsay, Febuary 7, 1673,* in the duply.) Yea what privileges and badges of sovereignty old Rome had, the same, by common consent of all nations, have been stated upon the respective metropolises of kingdoms. Now to fetch so intolerable a prejudice as this would prove, upon Edinburgh, for satisfying the lust and pleasure of some few, pretending themselves to be interested therein, were a thing immeasurably unjust, and which in no equity can be craved; especially considering, that the whole country, within thirty or forty miles of Edinburgh, yea the whole north and south, the one for their lambs, and the other for their corns and kye, would be so far from having any benefit by such a change, that, to the contrary, the same would redound hugely to their loss and disadvantage; in so far as there would be no such consumption of victual, and these other above-mentioned commodities in that case as now; seeing beer and ale are most drunk in the summer, and if the session sat only in winter, all who could reach wine would rather drink of it. Yea by it the King would be hugely prejudged in his customs of wine, cloth, and silks, for which there would be no such vent as is now. But the King has dispensed with his part of the loss by the sumptuary law now past. *4to*, The spirits of men, like to bows, if they stand in continual bensell, they slack and spoil; and therefore, the very four months of the winter session, as it now stands, were judged too long for the Lords and Advocates' heads to run constantly on business; and the Yule vacance was introduced not so much upon a principle of religion, as for a relaxation to men's minds; and if the length of four months afford tedium and lassitude, how much more if it were six? That it is absurd to think a nation, for the space of six or seven months together, should want a visible form of a supreme court of justice. (Yet they pretend the town of Edinburgh will have no prejudice, because the vintners declare they

way of information for the members of Parliament in August 1681; though the Parliament then by their act, without respect to these reasons, took the Summer Session away.

* Livius lib. ii. p. 27. Plutarchus, in *Coriolano*. Florus lib. i. cap. 23.

had rather have one month more in winter than the two months of summer session. *2do*, This orderly way of discussing causes by the book of enrolment, will demonstrate, say they, the unnecessariness of the summer session, since the fourth month of winter, at least fifth, will discuss all the causes in Scotland, and [drive] us in a short time to rising at eleven o'clock for want of ado; especially that part of the regulations being observed, That no causes within 200 merks be pursued in the first instance before the Lords.) *5to*, If a man suspended a charge of horning in January or any of the months ensuing, he might by this new model sing a requiem to himself till that time twelve months, for sooner *per rerum naturam* it could not be heard; but as it stands now such suspensions may be got discussed in the summer session. Siclike if I warn a tenant to remove at Whitsunday, I could not, by the said overture, get the legality of my warning declared, nor a decreet of removing sooner than November or December, whereas now I may have my decreet in my hand ere the last of July. Neither solves it the inconvenience to say, I may pursue these things before the inferior Judges, who sit at all times; for 1*mo*, There be many actions to which they are not competent; *2do*, In the rest, the defender will either procure them advocated or suspend them. Now how great prejudice the lieges may sustain in the delay of their actions which merit summary process is very conceivable. I shall only give one instance. Conform to the late act of Parliament, I charge my debtor to the effect I may thereafter comprise and come in within year and day of some anterior comprisers; the debtor gets my letters suspended simply, which will comprehend a suspension of apprising as well as of personal execution; ere I get the suspension discussed, year and day expires, and so I lose my diligence and the benefit of the act of Parliament anent comprising within year and day, and will have right allenarly to the reversion. I think the debtor's dole *et mora* in suspending, ought not to postpone his diligence. *6to, Nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est; l. 35. D. de Reg. Juris. Igitur*, the diets of the Session being established by a continued series of acts of Parliament, renewed from time to time; the same cannot be altered by our Lords' regulators nor by the King, except in face of Parliament assenting thereto. *7to*, Though it appears by act of sederunt on the 20th of January 1586, and other places, that the diets of the Session have been otherwise constituted than they are now, yet they cannot say but there was ever a summer Session. And the regulators would remember that they have wronged the town of Edinburgh enough already by their regulations, though they do not this additional wrong too; and by nothing so much as that of the enrolment, though a secret stroke.

Advocates' MS. No. 231, *folio* 106.

Anent Loosing Arrestments.

An arrestment laid on by virtue of a decreet or a registrate bond, (the registration being a decreet of consent,) cannot be loosed by offering to find caution; and it is only arrestments laid on upon dependences, or where there is no decreet, that

can be loosed. Hence the deliverance of all bills for loosing arrestments bears, If the same be not laid on by virtue of a decreet.

Advocates' MS. No. 232, folio 107.

On a Baron's decreet or rollment of Court, the Lords will not grant by letters of horning summary execution, because of the meanness of their jurisdiction; and that the acts of Parliament, viz. act 10 *anno* 1606, and act 15, 1609, &c. appointing letters of horning to pass on sheriffs, stewarts, bailies, (as well of royalty as regality,) admirals, and commissaries, (though they are only foisted in by a wrong narrative in the said act 1609,) their acts and decreets, make no mention of baron courts; and therefore when horning has been craved on the decreets of the bailies of Leith, it has been refused because it is only a burgh of barony; (yet horning passes on the decreets of the first bailie there, because he has a sort of admiral power;) and the sole execution can pass upon such, is the baron or his bailie their precept to their officer for poinding the defender (if so be he was subject to their jurisdiction,) his goods or geir lying within the barony: the apprising whereof, in my judgment, should not be at the market cross of the head borough of the sheriffdom or regality wherein the barony lies, seeing that is *extra territorium*; but at the place where the baron court is keeped, which undoubtedly will suffice. And if the baron or other person who has recovered decreet before the baron bailie would have letters of horning on his said decreet, he must suit letters conform, either before the sheriff or Lords of Session, or crave the defender to pay such a sum contained in the rollment of court, and produce his said decreet *in modum probationis*, and then on the decreet conform given by the sheriff or Lords, he will get *paratam executionem* by horning. And truly it is just it should be so, because of the universal ignorance of the baron bailies; and seldom there are any thing proponed for the defenders, but allenarly, The bailie having considered the complaint of sic a man against sic a man, found——. Yet if a man be decerned in such a court for contumacy in refusing to give his oath, the matter being referred thereto, and he being present in Court, I think the Lords should not repone him again to his oath.*

Advocates' MS. No. 233, folio 107.

Anent Letting of Debtors' Lands.

Where a creditor (whether he be compriser or infefter,) is in possession of the debtor's lands, and finds the same so racked that if the tenants get not an ease in

* *Infra, May,* 1676, *No.* 474 [Hamilton, Historical Volume;] *and* 496, § 2, [*Balfour* against *Pidgeon, 10th October,* 1676, Historical Volume.]

the rent they pay, they will forsake the ground and leave it waste, and none will take it on those terms they had it; for his own security that he be not made countable, either by the debtor or co-creditors, for the rental the land was at when he entered, and lest it be obtruded he had not power to give the tenants any thing down of what they paid, or set the land cheaper than he found, his safest course will be to cause intimate, by the space of three sundays, at the kirk doors of four or five of the most adjacent parish churches, that he is about to set such and such lands lying in such a parish, &c. for payment of the yearly duty of , and if there be any person who will be willing to pay more than what he is to set it for to the present tenants, let them come and they shall have it. Which solemnity being done, and none appearing to offer, he may then without hazard set it as he can best agree, with the least diminution and prejudice to the heritor that he can. And this was used by Sir William Dick's creditors in the lands of North Berwick.

I think this course should be taken by all who have not *plenum dominium*, but may be drawn to an account, as tutors and the like; or they may crave this by a bill given in to the Session. See *27th of January*, 1680, *Cleilland and Laminton*; *item* *15th February*, 1681, *Littlejohns*. *Advocates' MS. No.* 234, *folio* 107.

Anent a Bastard's Testament.

As for that rule of law, *Bastardus non habet testamenti factionem*, I think it only militates in the case where he has no children procreated in lawful marriage; in which case, without a letter of legitimation, he cannot prejudge the king or his fisk by way of testament; (for he may lawfully dispone either moveables or unmoveables in his *liege poustie*;) but where he has lawful bairns, he may certainly test upon his moveables, and name his bairns executors to him, (*Quæritur*, if he may name strangers,) since they would succeed to him *ab intestato* in these goods. *Vide infra, February*, 1676, *No.* 471, § 7, Lord Colville.

Advocates' MS. No. 235, *folio* 107.

1671. *November.*

The beginning of this session, the Lords appointed what processes had been seen the summer, should not be seen again in this winter session, but come in according to the order of their enrolment; notwithstanding the act of sederunt of the 8th of November, 1665, ordering processes seen in the summer to be seen again in the winter, but not *e contra*; which act they hereby abrogate.

Advocates' MS. No. 237, *folio* 108.

1671. *November 7.*

ON this day the following *species facti* was debated in the house. A certain creditor (to the effect he may either comprise or adjudge certain lands, whereto his debtor had right *jure sanguinis*, and as heir to the person who stood last vested and seased therein,) charges his debtor to enter heir in special to the said lands, as heir to his father, goodsire, or some other his predecessors, who stood last vested and seased therein; another creditor informing himself better, and getting true notice that it was his uncle, *exempli gratia*, who stood last infeft in these lands, and that he is his nearest heir, he charges him to enter himself heir in special to his uncle. Upon thir charges they both comprise or adjudge, according as the debtor compears to renounce or not to renounce; and afterwards competing for the mails and duties of the said lands, it was ALLEGED by the second creditor that he must be preferred, because the charge given by the first is null, at least their diligence is not so exact as his, in so far as he condescends not expressly by name and sirname on the person to whom he is charged to enter heir, and who stood last vested and seased in the said lands, but only by a general clause to enter heir to any of his predecessors who shall be found to have died last vested and seased in these lands; which seems as absurd as if he were charged to enter to lands without designing specially the lands.

To all this it was ANSWERED,—That it were a thing of very dangerous consequence to cast a comprising or adjudication upon such a *punctilio* of form as this, especially these general clauses having been very much frequented in the styles of special charges hitherto.

Some practiques not altogether unlike were called to mind, viz. One is made donatar to a ward, as falling in the King's hands through the decease of the goodsire; another discovering the goodsire was denuded before his death, and that the son was in fee, and so vassal, he procures a new gift of the ward, as vacant by the death of the son who was last vassal. In a competition betwixt the two donatars, the Lords did prefer the last, because his gift contained *verum modum vacationis*.

There was another, viz. A creditor comprises from his debtor the fee of some lands wherein he stood infeft, with all right whatsomever he had to the said lands; another creditor knowing he had only a servitude or an infeftment of annualrent in these lands, he comprises expressly his right of the annualrent; who, in the competition, ALLEGED he ought to be preferred to him who had comprised a *non-ens*, viz. the property, which noway belonged to the common debtor. Yet the Lords inclined to sustain the first comprising, because of the general words, And all other right standing in the person of the debtor; which must in this case be reputed equivalent to a special clause. *Quæritur, quid juris*, where, a comprising is led of lands as the same are expressed and bounded in the debtor's own charter, without saying any more? *Item*, where a man grants a precept of seasine for infefting me in all his lands, without special enumeration of any, or where some are named, and then a general clause adjected, And in all the rest of my lands, Whether this will furnish good action for poinding the ground of any part of his lands, or if it will reach lands acquired by him, yea or no?

The parallel will also hold, If one should take a gift of escheat in general, without expressing the particular horning and denunciation; or a gift of ward, without

telling the special way how it vaked, and by whose death; or a gift of recognition, and not express the specific deed by which that delinquency or casualty was incurred; or a presentation to a kirk, or a gift of an office, without telling *verum modum vacationis;* or a general wadset of lands; and another shall afterwards take a second gift of escheat, ward, non-entry, marriage, recognition; or a second presentation or gift of a place; or a special hypothec; and they bear the particular deed, *et verum modum vacationis;* in a competition, the second would be fair to be preferred to the first. *See Act 23d, Parliament* 1567; *Codex Fabrianus tit. de Sacrosanctis Ecclesiis, definit.* 1, 4, *et* 82. *Speciale pignus magis afficit rem quam generale,* says Gothofred in *notis ad leg. penult. D. In quibus causis pignus vel hypotheca remittitur:* which is applicable to the haill foresaid causes; as also to two comprisings or two assignations, that the special is preferable to the general. *Vide infra, February,* 1677, *No.* 550, § 3, *Arbuthnot.* See Durie, 20*th Nov.* 1628, *Watson and Stewart.* *Advocates' MS. No.* 238, *folio* 109.

1671. *November* 7. Anent Apprising.

When that imaginary ceremony of searching for moveables upon the ground of the lands, before the messenger can legally proceed to denounce them to be apprised, is used, an offer of cows or other cattle, to the value of the sum, will not impede the denunciation or apprising, nor the proving of the said offer will not be a ground whereon the comprising can be thereafter branled, as has been often decided; and that for three reasons; 1*mo*, It is *aliud pro alio quam solutionem debitori facere non licet creditore invito.* 2*do*, An offer of payment to the messenger *non relevat*, because he has no power to receive it, and therefore it should be made to the party. 3*tio*, They should take their beasts themselves, dispose upon them, make penny of them, and so satisfy their credit. Yea in Cromartie's case, in 1664, the Lords found an offer of silver plate to the value of the sum owing, was not relevant to impede a comprising of lands, because it was not *argentum signatum;* and it is species and illiquid, and so cannot compense or pay. This agrees with *lex Quintus Mutius,* 27. *D. de Auro argento et mundo legatis.* *Advocates' MS. No.* 239, *folio* 109.

1671. *November* 8. Sir John Wilky of Foulden *against* Sir James Carmichell and Others.

Sir John Wilky of Foulden, pursues a declarator against Sir James Carmichell, Mr. Wm. Cheisley, William Brown, agent to the boroughs, and others, to hear and see it found and declared, That a bond granted by the said Sir John, as principal, and Sir James Carmichell, as cautioner, was void, null, and extinct, in so far as the same was satisfied and paid with the principal's own monies; and consequently, that the assignation taken by the said Sir James, in Mr. Wm. Cheisley's

name, should operate and take no effect against him, the debt being paid in manner above expressed.

Against this it was ALLEGED by Sir George Lockhart, That the bond can never be declared extinct, but the assignation taken thereto by the cautioner must stand good, in so far as the said bond was satisfied by the sole moyen and credit of the cautioner, who borrowed the money owing in the bond from Johnstone of Hiltoune; for which a bond was again granted by Foulden, as principal, and the said Sir James, (who was cautioner in the first bond) as cautioner; and so as to him it was just alike as if he had remained cautioner in the first bond.

REPLIED,—By the payment, the first bond was wholly taken away, and though money was borrowed for paying thereof, yet it must be reputed to have been satisfied by the principal, since he continued principal in the new bond, and liable to the cautioners by an express clause of relief.

The Lord Newbayth inclined to sustain the declarator; and thought the taking the assignation to the first bond, *ad majorem cautelam*, and for better recovering of his relief, unwarrantable.

Yet Sir George contended he might, since he continued still debtor for the sum by becoming cautioner in the second bond.

Advocates' MS. No. 240, *folio* 109.

1671. *November* 10.

A CERTAIN person pursuing a woman to relieve him of some ministers' stipends paid by him for his possession of some lands set to him in tack by this woman; ALLEGED absolvitor from this, because the time she signed it, she was *vestita viro*, and so it cannot oblige her. REPLIED,—She cannot be heard, because he offers him to prove she has homologated the said tack since her husband's decease, by accepting of the tack-duty, and granting discharges thereupon. DUPLIED,—What payment she has got must never be reputed ratihabition of the tack, because she ascribes it to another cause, *viz.* her liferent infeftment.

Advocates' MS. No. 242, *folio* 110.

1671. *November* 10. ——— *against* FRAZER of Middelty.

FRAZER of Middelty being pursued on a registrate horning to pay the annualrent of the principal sum, since the date of the denunciation, conform to the act of Parliament made in anno 1621; it was EXCEPTED that he could not be liable in annualrent, because the horning whereupon it was sought was most unwarrantable, in so far as it did not bear any previous precept of the sheriff's, who pronounced the decreet, to have been raised, at the least no charge nor execution given thereon; which ought first to have been done, conform to the 177th act *in anno* 1593, compared with the 10th act, in 1606, and to the constant practique of

the kingdom. This defence was found relevant. *Vide infra*, [*No.* 251, *Nov.* 11, 1671, *Mathy* against ———]. *Advocates' MS. No.* 243, *folio* 110.

1671. *November* 10. CHRISTOPHER LE NOIR, Frenchman, *against* JOHN BROWN, Younger and Elder.

THIS was a summons at this stranger's instance, bearing, How he having come to Scotland upon his affairs, and being kindly entertained by this John Brown, the factor, and invited sundry times to dine with him at his house; one day after dinner, the father declared by his son (who was interpreter betwixt them, Le Noir understanding no Scots, and the father having no French,) that he would very gladly his son should merchandise with him; and if at London he should furnish him with watches or any commodities of that kind, he should not repent it. According to which communing, young John Brown having come to London, and received from the said Le Noir, in trust, near L.200 Sterling worth of merchandise, he now pursues both the father and the son for making payment of the said sum to him; the son as having received the ware; the father as having encouraged him to trust his son, and promising he should not suffer him to be a loser; so that certainly *secutus est fidem patris*, yea the half of this would have sufficed in England, (whose customs we follow where we have none of our own,) to make the father liable: If ye be but present with a man when he takes off merchandise it will bind you; but I think this is only if you say the party is sufficient. And for farther security, he arrests in the father's hands sundry sums of money, as alleged, owing by him to his son, by virtue of his mother's contract of marriage.

ANSWERED,—The first part of the libel is wholly irrelevant, unless they say letter of advice, bill, or some other express warrant or promise, that whatever he should furnish his son should be allowed; and as for the pretended words libelled on, they are so far from inferring any obligation against the father that they deserve no answer.

The Lord Newbayth was clear to assoilyie from the summons, as irrelevant. The last part he sustained, and ordained the contract of marriage to be exhibited.

Vide infra, November 8, 1676, *Kinneir, No.* 502.

Advocates' MS. No. 245, *folio* 110.

1671. *November* 10. NICOLL *against* HUNTER.

A BOND was craved to be reduced upon this reason, That it was granted *in lecto ægritudinis*, in so far as the granter, the time of the making thereof, was affected with the pest, was enclosed upon that account, never came furth, but within some three or four days thereafter departed.

The Lords assoilyied from the reason, as not relevantly qualifying death-bed, though the bond was *probatio probata* to itself, narrating his sickness of the

plague was the cause why he made the same. Yet Craig seems to be of the other opinion, page 86. *Advocates' MS. No.* 244, *folio* 110.

November 10, 1671.—HAVING more ripely considered the reason of reduction proponed *supra* betwixt Nicoll and Hunter, at number 244, it seemed to deserve the Lords' answer; for though *tempus pestis* be *tempus privilegiatum*, and so *testamentum factum tempore pestis non requirat septem testes, et alia quædam habeat privilegia*, yet there is no law or practice in our country allowing them to dispone an heritage after they are affected; and there is reason for it. If a fever incapacitate a man from alienation of his real rights, much more should *febris pestilentialis* do it, since all the reasons inductive of that law have place there, *videlicet, insanitas mentis*, solicitation of friends, &c. And Craig *ubi supra* is so clear in it that there is no room for any doubt, for (which is more) though he be *intactus*, if the family be infected, he concludes him incapable of making any real conveyance. *Advocates' MS. No.* 248, *folio* 111.

1671. *November* 8 *and* 11. SIR LAURENCE SCOT *against* DUKE OF HAMILTON.

November 8.—SIR LAWRENCE SCOT, sometime of Clarkington, as having licence, pursues Duke Hamilton for sundry annualrents of the principal sum of 26,000 merks owing by Duke William to Sir William Scott his father, who died in 1656.

ALLEGED, The Duke must have defalcation of eight years annual rent, indulged to the forfaulted persons the time of the usurpation; which is founded first on an act of Parliament, granting commission to sundry persons for trying and taking probation upon the losses of the several forfaulted persons, and then on an act of Council, finding the losses of the house of Hamilton to have been so great that they deserved the said benefit. To which it was REPLIED, That the most the Duke could crave was only six years and a half, because he had got allowance from the liferentrix of the sum of an year and a half's annualrent, upon the account of their forfaulture. *2do*, The said act of Parliament and act of Council following thereon cannot be respected, because it was but a private act; he was not called thereto, and therefore his interest by the act *salvo jure* was reserved. To thir it was DUPLIED, *1mo*, The Duke craved but allowance for six years and a half. *2do*, He can never ALLEGE it was done *parte non citata*, because he was expressly called to the trial taken before the Council. *3tio*, The Lords cannot be judges for taking away an act of Parliament. TRIPLIED, His calling then imported nothing, because then he had not a right in his person, and so had no interest to oppose: yea, there was one of the Duke's creditors compeared and opposed, and he is expressly excepted out of the act, and is ordained to be paid of his haill annualrents.

The Lords, without respect to the act, reponed Sir Laurence to his defences; and appointed him, as if he were *in campo*, and as if the said act were never passed, to

object what he would have said against the same if he had compeared before the passing thereof.

Conform to which interlocutor it was ALLEGED, The Duke could in no reason plead for eight years defalcation, because they offered them to prove that the Dutchy of Hamilton was detained by the enemy only from the 1652 till 1654, scarce by the space of two years, and so their loss was not so considerable as to afford them the foresaid benefit; yea, their advantage in being sequestrate was very great, seeing on that account they got considerable abatements from their creditors.

REPLIED, Their losses were very great, as appears by the probation led before the Council: neither will any man in law or reason say, that the only rule for judging whether a man should be eased of eight years annualrent must be the space of time their estate was detained by the usurpers before they recovered the peaceable possession thereof again.

They were to have the Lords' answer, whether the Duke should have the said defalcation, yea or no, seeing his lady stood forfaulted but two years.

Advocates' MS. No. 241, *folio* 109.

November 11.—In the foresaid action betwixt Sir L. Scot and Duke Hamilton at Number 241, taken to interlocutor, the Lords found the Duke should have defalcation of eight years annualrent; without prejudice to the fiar to debate with the liferenter why she and not he should bear that burden, and but prejudice to them of seeking reduction of that act in favours of the Duke in the next Parliament. *Advocates' MS. No.* 249, *folio* 112.

1671. *November* 11. HAISTY *against* HAISTY.

THIS was an action, at the instance of a relict against her husband's oldest son and apparent heir, for refunding to her the expenses she was at, the time she lay in of a postume child, as also for aliment to the said postume child, his sister.

ALLEGED,—It is contrary to our law, and the constant practique of this kingdom, for seeking that one brother or sister should aliment another; yea, it has been expressly found that they are not obliged to do it.

ANSWERED,—They crave nothing but what natural equity, in its greatest purity, would dictate; they are clearly founded in the common law: neither is our practique so averse to it as they would make it; for in the case *Edgars* against *Edgar of Watherly*, the Lords modified a small provision to the younger children, to be paid them by the Laird.

It was taken to interlocutor. The report was, that the Lords, having seriously considered the case and its merits, find a brother liable to aliment a brother *in tota latitudine*; and declare they will follow this in all time coming, and decide conform thereto when the like cases occur.

I think they mean only the eldest brother, who either succeeds or may succeed to his father's fortune; and that he shall only be bound to aliment *fratres aut sorores germanos ex utroque parente, non item consanguineos et uterinos*; and

that this obligement shall only remain till they be of such age as they can rationally provide for themselves. With which explication, the decision is most just and most agreeable to natural equity. See Monsieur Servin's *plaidoiez*, last part, page 181; where, a father not found obliged to keep his bastard daughter, though it be recommended to him. *Quæritur*, if in our law a brother be obliged to aliment his bastard brother. *Sed puto quod non*, with Craig, *Feudorum p.* 265. *Vide L.* 4. *D. ubi pupillus educari debeat; L.* 1, *p.* 2, *D. de tutela et rationibus, &c.; L.* 73, *in fine, D. de jure dotium; L.* 20. *D. soluto matrimonio; L.* 13, *p. ult. D. de administratione tutorum, ibique Glossam et D D. Vide* Fabrum, *tractatu de alimentis, p.* 29; Stair's system *titulo* 5, *No.* 10.

Advocates' MS. No. 250, *folio* 112.

1671. *November* 11. MATHY *against* ———

ONE being pursued to pay annualrent for a sum since his denunciation, it was ALLEGED *absolvitor* from annualrent, because he was denounced not at the market cross of the head burgh of the shire where he then dwelt, *viz.* Glasgow, but at the market cross of Edinburgh, within which sheriffdom he dwelt never: upon which denunciation, no annualrent can be due; because the Lords after a most contentious debate betwixt *Dicksone* and *Hutchesone in anno* 1664, found, where a man was not denounced within the sheriffdom where he dwelt, that on such a horning neither his escheat should fall, nor annualrent be due; but the only effects thereof should be caption and debarring him *ab agendo et defendendo:* yea, the common law would teach a man so much, though we had no practique for it. Escheat is the punishment of contempt and contumacy; now a man cannot be made *contumax* by a denunciation made at another place than where he lives, since it is not probable it can ever come to his knowledge.

This was found relevant. *Vide supra No.* 243, [10*th November* 1671, *Fraser of Middelty;*] *and infra No.* 304, [18*th January* 1672, *Ramsay* against *Renton;*] *and* 463, § 3, [*February* 1676.]

Advocates' MS. No. 251, *folio* 112.

1671. *November* 11.

IT was OBJECTED against a declarator of escheat, It was not tabled. ANSWERED, 1*mo*, It needed not, since the rebel held no lands of the king. 2do, If he did, then his majesty's advocate's servant concurred for his majesty's interest.

2*do*,—It was objected that the horning whereupon the escheat was sought, is null, in so far as he is not denounced at the market cross of the Regality within which he then dwelt, and the lands lie. ANSWERED, This being a general decla-

rator * only, it was not the proper place for proponing any defences to stop the same; but they behoved all to be reserved to the special. REPLIED, *If it* were a partial exception, then he had some reason to plead it were incompetent *hoc ordine;* but for a total defence that takes away the whole libel, the same may very well be objected against the general declarator. The Lords found it might come in *hoc loco.*

Then ALLEGED, That the horning could never be taken away summarily by way of exception, unless they were in an ordinary action for reducing thereof; seeing this pretended nullity was only *nullitas facti non juris,* and so behoved to abide trial and probation; *vix.* that he lived then within that shire and regality; which trial cannot be taken here, but in a process apart. This the Lords found relevant, and therefore declared; reserving reduction of the horning as accords. *See Dury, 19th March* 1678, *Lamb; infra No.* 423, [*11th November* 1673, *Home* against *Craw.*]

Then it was OBJECTED, That the horning is yet null; and that by such an intrinsic nullity as verifies itself, needs no probation, and so must be received summarily in this process without any reduction: *vix.* it is not registrate within fifteen days, conform to the act of Parliament. That hornings ought to be registrate within the foresaid space, is proven by the law; that this is *not so* registrate, appears by ocular inspection, and needs no other trial; hence *necessarily* follows the conclusion that this horning is null. *Vide act* 75, *Parliament* 1579. The Lords found this nullity receivable by way of exception.

Then it was ANSWERED, The act of Parliament requires only fifteen free days, neither accounting the day of the denunciation, nor that of the registration; conform to which rule this horning is duly registrate, seeing it is registrate on the sixteenth day after the denunciation.

The Lords sustained the registration as lawful. *Vide* Hadington, 3 *December* 1611, *Lord Torphichen* contra *Earl of Mar;* see act 42, in 1555, and the many laws there cited.

Advocates' MS. No. 252, *folio* 112.

1671. *November* 10, and 14. FRANCIS HEPBURNE of Beinston *against* CONGILTON of that Ilk.

Nov. 10. Beinston having married a daughter of Congilton's, by contract of marriage Congilton was obliged to pay 5000 merks in name of tocher with his daughter. There is a pursuit raised at the instance of Beinston against this Congilton, as heir to his father, and on the other passive titles, for payment of the sum with the annualrent thereof since the term of payment, with the penalty incurred by him because of his failyie. It was DEMANDED first which of the passive titles they insisted on. They offered to prove he was heir served.

Then they ALLEGED absolvitor from annualrents, because they being only due *ex pacto* or *lege* as after denunciation upon a horning, there was none of these

* Exceptions not against the executions of the summons and the legality of the hornings, can only be objected against a general declarator of escheat.

here, there being no obligement by the quality of the right for payment of the same, nor were ever any of the parties charged for making payment of the principal.

To this it was REPLIED,—That the contract of marriage bore no obligement indeed for payment of annualrent, but they had done the equivalent, in so far as they had been in the use of payment of annualrents for this sum by the space of twenty years and more; which, by our law and the constant tract of many decisions, is sufficient to induce a necessity upon the debtor to continue in payment of annualrent so long as the principal sum remains unpaid; which he is presumed to do, that so he may obtain a continuation for a time; and by which, if he find himself lesed he has a remedy, viz. payment or consignation of the principal, *quæ sistunt cursum usurarum.* And if he had not paid me annual, then I would have lifted my sum and given it out to those who would have paid me interest for it; or if ye had not paid me willingly, then I would have denounced you, after which annualrent would have been due. (*Vide* Dury, 8*th March* 1628, *Foster and Clerk,* with the laws there cited.)

To which it was TRIPLIED,—That use of payment of annualrent for a sum otherwise not bearing annualrent, was so far sustained in our law, where it was made by the debtor's self, that the party payer had not only no repetition of the annualrents paid, as *indebite soluta ex capite condictionis indebiti,* but also it bound him (he being otherwise free,) in payment of annualrents *pro futuro;* but that payment of annualrents made by a third party shall draw on this burden and slavery upon the debtor, is a thing so remote from all human comprehension, law, and reason, that no man endowed with sense will offer to aver it. But this was their case; any annualrent paid, it was paid by the said Congilton's mother and goodame, and so *ex pietate et affectione materna.* What if they had gifted it to their daughter, should that tie the father in annualrent? What if a third party should pay annualrent for a sum which I am obliged to pay without annualrent; should that prejudge the debtor, and ensnare him in annual without his own consent or knowledge?

It was QUADRUPLIED,—That the payment made by the wife and mother must be reputed as if it had been made by Congilton's self; because, he being a a simple man, and overseeing none of his own affairs, the same were wholly managed by his wife, and, therefore, the payment made by her must bind him as if it had been made by himself. For what if a servant of Congilton's had paid it, the payment would ever have been reputed to have been in name and behalf of his master; and, accordingly, discharge would be given, not to him but to his master, at least to him in his master's name; and if so, then much more must the wife's payment bind him, she being a person more near to him, and so may the more naturally oblige him.

QUINTUPLIED,—That no payment made by the wife could prejudge the husband, unless they say it was done by his warrant and order; or that she had a factory from her husband, and was *preposita negotiis;* or that *ratum habuit* by allowing the same thereafter; or that it was *ex certa ejus scientia.* And I desire to know, if a principal should pay annual for a sum in a bond for which he is not bound in annual, if that will be enough to make the cautioner (who knows nothing of the payment) liable also; seeing it is certain that neither *correi debendi* nor *credendi* can do any deed to the prejudice of their other party.

The Lords found the payment not relevantly qualified, unless the pursuers would say it was made by warrant either tacit or express of the debtor, or that *scivit et tacuit ac non contradixit*, or that the wife had a factory.

After which it was ALLEGED that a warrant behoved to be presumed; and for the wife, she had a natural factory where the husband was incapable. And though there might have been some doubt if they had founded only on two or three years' payment, yet there could be none here, where there was so long, so deliberate, and continued a tract of payment by the space of twenty years and upwards. His accepting of discharges, and putting them up in his charter-kist, and keeping them there, was an evident ratihabition. *Item*, his son, whom they now pursue, he paid some annualrents. ANSWERED,—None of these are sufficient so much as to colour or shadow the payment, as done in any measure by a warrant. As for the son's payment, *first*, it was but *unicus actus*, and so says but little. *2do*, He was minor at the time. *3tio*, His father was then in life; and therefore, no such act done then can prejudge him now. REPLIED,—It cannot be called *unicus actus*, because they conjoin the payment made by him with the payments of other years made by his mother and grandame. *2do*, *Non relevat* to say he was minor; except ye will say he revoked it *intra quadriennium utile*. To the *third*, though his father was in life, yet he was his apparent heir, and was *utilis negotiorum gestor* for his father. The Lords required they should condescend farther and say either command, factory, ratihabition, or knowledge.

Then they ALLEGED,—That in 1665, the pursuer having required his money from Congilton, in regard he had then use for money, Congilton not being able to command it, he deals with Sir Robert Hepburn of Keith, who was owing him the like sum, to lend Beinston what money he stood in need of; who accordingly does so, but takes a bond off Beinston, bearing annualrent. Now their defence is compensation, in so far as, If ye liberate Congilton of annualrent for the tocher, then ye must also free Beinston of the annual of the said sum at Keith's hand. ANSWERED,—The ground of compensation is most irrelevant, it nowise being *ad idem*; for what Sir Robert then gave was not *datio in solutum* but truly *mutuum*, and so he might provide himself with what manner of security he pleased. *Et sic non versatur circa idem subjectum; nec est inter easdem personas.*

Then they offered to prove by Congilton's oath, that he promised to pay annualrent for this sum. This was found relevant.

When they insisted for the penalty, it was ALLEGED,—That he was minor, and was never interpelled to pay the same till of late; and so not being *in mora*, he could not be liable in any penalty. My Lord Newbayth, conform to some practiques of that tenor, refused to decern for any penalty if they insisted for any annualrent, but offered to modify as much of the penalty as would satisfy the annualrents of the sum; but refused to decern for both.

Advocates' MS. No. 247, folio 111.

Nov. 14.—THE debate at No. 247, betwixt Beinston and Congilton being reported this day, the Lords found the use of payment of annualrent made by Congilton's mother and lady, sufficient to enforce the necessity of payment upon this Congilton, heir to his father, as if the same had been due by paction; in regard it consisted in the knowledge of sundry of the Lords that Congilton, after a fall, was *frappé*

and unfit for any affairs, and that his mother managed all with his consent; and that he accepted the discharges, and that the same are in the charter kist; and that it was *utiliter gestum*, since Beinston would have comprised if they had not paid annualrent. *Item*, the payer was mother to both, viz. both Congilton and the Lady Beinston; and so, presumed to have a like affection and care for both. On thir considerations the Lords decerned both for principal and annualrents.

Advocates' MS. No. 253, folio 112.

1671. *November* 14. ANDREW MARTIN *against* MR. JAMES KENNEDY.

THIS was a suspension of a decreet obtained before the Bailies of Edinburgh, on thir two reasons, *first*, Because the said Andrew, pursuing as factor for an Englishman, no factory was produced, and so, he having no title, the decreet was intrinsically null; *second*, Kennedy at that time was Sheriff-clerk of Aberdeen, and so not liable to the Bailies' jurisdiction.

It was ANSWERED to the *first*, They opponed the decreet wherein he is holden as confest. To the *second*, He cannot be heard to decline the jurisdiction of the town; because they offer them to prove he resided forty days before the decreet pronounced, within the town, or after it; and so by the constant practique, he must be answerable thereto.

This was found relevant, and admitted to probation.

Advocates' MS. No. 254, folio 112.

1671. *November* 14. ARCHIBALD HYSLOP, Bookbinder, *against* MONTGOMERY of Mackbiehill.

THIS is a charge upon a bond of 200 merks; which was suspended upon this reason, That though the bond bore borrowed money, yet he offered him to prove by the charger's oath, that the true cause of granting this bond was not money received, but allenarly for prentice-fee, to be paid by the defender for his son, whom he had bound to the charger. Which being granted, then the charge behoved to be suspended *simpliciter*, and the bond declared void and null; because he offered him to prove that the boy lived not half a year after his entry, and so there can be no prentice-fee due, and the bond falls *in non causam*. It is *causa data causa non secuta*; it now remains with the charger, *sine omni causa*.

ANSWERED,—That whatever would be, where the prentice-fee is due by an indenture, which has mutual obligements on both master and prentice; on the master to teach his calling, on the prentice to serve dutifully; yet it is far otherwise where there is a bond granted for borrowed money: in which case he obliges himself *in omnem casum* for the money, and undergoes the hazard, whatever it may be; unless he be able to make it appear, that *per eum et ejus culpa*

stetit that the boy stayed not out his whole time, or that he ran away because of hard and unaccustomed usage, or that he died.

REPLIED,—He acknowledged no difference betwixt an indenture and a simple bond save this, That an indenture was *probatio probata* to itself, and he needed no more to instruct the cause of the debt to be for prentice-fee but the indenture itself; whereas an absolute bond would militate against me without any remedy, if the party to whom I granted the bond be dead. But he being in life, I will cause his oath serve instead of a back-bond, and I will make him confess that the true cause of it is for prentice-fee; which being once done, then there remained no imaginary difference betwixt it and an indenture. But what defence would elide him charging on the indenture must undoubtedly meet a charge on this bond; and, therefore, if no prentice-fee due upon indenture could be craved when the boy died so shortly after, neither can it be sought upon a bond.

DUPLIED,—They offered them to prove that it was the custom of the burgh of Edinburgh, though prentices died within the years, yet the haill prentice-fee was due; and where the master died, then ere his relict or executors can have right to the prentice-fee, they must bind the boy to a master of the same trade for the years yet remaining.

They were to have the Lords' answer on it.

Then Sir J. Harper added another reason, That *esto* the Lords find prentice-fee due, though the prentice die presently after his entry, (which they will never do,) yet in this case it will never be due; because he offers him to prove the boy was starved with hunger and cold, in default of the charger.

ANSWERED,—He offers him to prove it was in his father's default, who hindered him to come home to his house to diet and bed. *Vide supra, numbers* 133 *and* 134, [*February* 1671.]

Advocates' MS. No. 256, *folio* 113.

1671. *November* 14. Anent a STEP-FATHER MARRYING HIS STEP SON'S RELICT.

THIS day it was questioned amongst the advocates, What was to be judged of a marriage where a step-father married his step-son's relict. *Exempli gratia*, if John Boyd, bailie, could marry Adam Steven his step-son's relict, (supposing Adam had been married and were dead,) or if rather it were not incest. That same question will occur in a step-mother, if she might lawfully marry her step-daughter's husband, the step-daughter being dead. The advocates were divided in their opinions. Sir George Lockhart thought it lawful. In my humble opinion, I think it noway safe; seeing *inter eas personas quæ locum parentum liberorumve inter se obtinent, nuptiæ contrahi non possunt usque in infinitum*, they being *ascendentes et descendentes*; so that if Adam were now on life and not Eve, he could not find a wife whom he could lawfully marry. *Item, in recta linea quicunque gradus prohibentur in cognatione seu consanguinitate, iidem prohibentur in affinitate.* And though the relation that intervenes betwixt me and my step-son's wife, be only *affinitas affinitatis* or *affinitas in secundo gradu, uxoris meæ filius* being to me *in primo genere affinitatis, illius uxor in secundo*, and so ought to

be no impediment of marriage betwixt us; and though I may lawfully marry the relict of my wife's brother, *cap. Non debet, et ibi Glossa, ext. de consanguinitate et affinitate,*—Covarruvias *de matrim. part.* 2, *cap.* 6, *p.* 7, *num.* 6; yet I conclude with Papinian, *lege* 15. *D. de ritu nuptiarum, uxorem quondam privigni conjungi matrimonio vitrici non oportet, nec novercam in matrimonium convenire ejus qui privignæ fuit maritus.* The reason is well assigned by Vinnius *ad par. 6tum num. 2do Instit. de nuptiis:* not because they are *in linea ascendentium et descendentium in secundo genere affinitatis,* as Gothofred would have it, *ad. D. l.* 15, but because natural shamefacedness and honesty will not suffer me to marry his relict, whose mother was my wife, and so became in a manner my son; no more than a man can marry his son's relict. And though it be not expressed in the tree published at the 16th act of Parliament in 1649; yet by analogy it will be easy for any man to find it there defended and discharged; seeing there is too great a commixtion of blood therein.

Vide Antonium Matthæum *ad Tit. de Adulteriis, capite* 7, *No.* 26; *infra, No.* 492, § 8, *in July,* 1676. A man may lawfully marry his wife's brother's relict. *Vide* Trentleri *selectas disputationes, titulo De nuptiis, thesi* 3tia.

Advocates' MS. No. 257, *folio* 113.

1671. *November* 17. DUMBAR *against* HAMILTON.

THIS was an action at the instance of a creditor, against an executor confirmed, for payment of a sum contained in the defunct's bond.

ALLEGED exoneration, because the inventory of the testament is exhausted by lawful sentences recovered by me before your citation.

To which it was ANSWERED,—That no respect can be had to the decreets produced, neither can they infer exoneration to the executor; because the first proceeds upon manifest collusion, in so far as it is given upon no earthly probation but the oath of the pursuer in that decreet, whereto the executrix referred the same: which manner of probation can never prejudge a real creditor, who proves his debt by bond. Yea, though the pursuer had offered to prove the truth of the debt by the executrix her oath of knowledge, (which case is much more favourable than ours;) and she accordingly had confest the same, though that would have affected her, yet it would never have imported a discharge or exoneration to her, at the hands *creditoris chirographarii; ergo,* much less must it liberate her in our case. As to the other decreet, the same is evidently upon collusion, in so far as it is at the instance of a woman, as heir to her father; and no title produced in her person. *Vide* Dury, *6th March* 1627, *Scott* against *Cockburn.*

To thir it was REPLIED,—That he could not be heard to quarrel thir decreets *hoc loco,* because the parties, obtainers of the decreets, are not cited nor present to maintain their own decreets; whose *jus quæsitum* by the decreet, can never be taken away, but either by a deed of their own, or in a reduction whereto they are called to defend their rights, and not summarily here, they not being heard; seeing, if they were called they would, it may be, allege that though they referred the debt to the executor's oath, yet they had writ for verifying the same, as

well as you; and so more privileged, being prior in diligence. This being an ordinary practice, both before inferior courts and your Lordships, That though I can prove my claim by writ, yet I will refer the verity of it to your oath; and if ye would deny it, then I will resile and prove it by writ. And as for the pretended collusion, it is no otherways probable but by the executor's own oath.

To which it was DUPLIED,—That he needed no reduction where the nullities of the decreets founded on were intrinsical, and resulted from the decreets themselves, and so needed no other probation: and the executor should have suspended upon double poinding, in which case I would undoubtedly have been preferred to these other pretended creditors. And where he says he had writ to prove it, though he referred it to her oath, it is duplied, Though that may lawfully be done where ye have to do with him that is *dominus bonorum*, yet it is noway lawful to do the same with an executor, who is only an administrator, *et nudum habet officium*.

It is certain a sentence obtained upon a probation by oath, will never militate against a creditor by bond; but if, in fortification of the oath, they offer to restrict the debt also by writ, I think it should be received.

The executor had another defence here, viz. that she was not liable to pay, (in case the foresaid decreets should not operate exoneration,) but only to assign. It was ANSWERED,—He behoved first to say he had done diligence. Second, he could not be heard now to offer to assign, because it was after six years, during which time he might have received the sums. REPLIED,—An executor was obliged only to do diligence by pursuing, obtaining decreet, and charging; all which he had done; and then *cedere actionem*; which he now offered.

Advocates' MS. No. 258, *folio* 113.

1671. *November* 18.

ONE being convened upon the passive titles to pay a debt owing by his father, and the pursuer insisting against him, as lawfully charged to enter heir; it was ALLEGED the charge was unlawfully and unwarrantably given, in so far as it was not executed against him till after the execution on the summons, and that being the passive title on which ye intended to make me liable, it behoved to precede the summons, and exist before the same. To which it was REPLIED,—That it needed not pre-exist, but behoved to exist, though supervenient; as well as a summons against a man as heir, will be sustained against him, though he was not heir served and retoured the time of the executing the summons, but be served long thereafter.

The Lords found there was not *par ratio*, and therefore refused process against him as lawfully charged on that summons.

Advocates' MS. No. 259, *folio* 114.

1671. *November* 18.

THE Lords found an assignation to an heritable bond, or a legacy left out of an heritable sum, though they will not militate against the heir, but are reduceable at his instance; yet that the executor was convenable on the clause of warrandice, and that such rights are valid to affect the moveable estate, and so the executors are liable therein; though it was alleged that disposition of heritage on dead-bed, is a deed simply null of the law: *quoad falsum est*; for it is only null *quoad* the heir.

NOTA,—That *insanitas mentis* is not the great adequate reason inhibiting deeds *in lecto*, (though it be commonly given for it,) else such deeds should be absolutely null, both *quoad* heir and executor, and should not stand valid against the executor. *Vide omnino* Durie, 22*d January*, 1624, *Drummond* and *Drummond*, with the laws and authors there cited; *infra*, *June*, 1676, *Mitchell* and *Littlejohn*, *No.* 478. *Advocates' MS. No.* 260, *folio* 114.

1671. *November* 18. Anent CURATORS.

[*See the Case here referred to, supra, No.* 40, *page* 476.]

IN the action before mentioned betwixt Eleis of Southside, and Carse, *supra*, at No. 30, they found, though the office of curatory expired by the minor's arriving at his perfect age of twenty-one, and that they were not liable to count for any of his rents, except what they actually intromitted with after his majority; yet if there be one curator nominated by the rest, and sole intromitter, if he intromit with any part of the minor's rents after his majority, *eo ipso*, he shall be liable for all that year whereof he uplifted a part, though the same be small, because he should have continued his intromission; though it might very well have been objected, that if the tenants had not made voluntary payment of their farms to him, he had no right of exaction; he could not legally compel them, seeing his right was expired. But I think, if such a curator could say, that the tenants refused to answer him, it would deserve its own consideration.

Advocates' MS. No. 261, *folio* 114.

1671. *November* 18.

THE Lords found a clause in a contract of marriage, that such a woman shall be a bairn of the house, notwithstanding her tocher, obligatory; so that the wife may not, in prejudice of her husband, dispose upon it in testament to her own children, nor discharge it. *Vide* Dury, 6 *July*, 1630, *Aikenhead* against *Bothwell*. *Vide* Hope, *tit. De successionibus, in practicis observationibus patris, folio* 108, *ubi contrarium*; as also *Lex* 15. *C. de Pactis* seems contrary. Dury, 15th *July*, 1636, *Drummond*. *Advocates' MS. No.* 262, *folio* 114.

1671. *November* 18. Anent PAYMENTS to BANKRUPTS.

Quæritur, If a man may lawfully pay a sum owing by him to a bankrupt, after he knows the man to be bankrupt. If he have a decreet of *bonorum*, and so has disponed all his goods to his creditors; or if any creditor has arrested it, then it is out of all doubt he cannot safely pay it to the debtor; but the question is, where there is nothing of that. In which case I think he may.

Advocates' MS. No. 263, *folio* 114.

1671. *November* 18. Anent BONA FIDE POSSESSION.

WHERE a man possesses by a coloured title, whereof reduction is raised at the instance of one who has a better right, yet he retains possession ay till sentence; *quæritur*, if he be obliged to restore the fruits consumed by him between the citation and the sentence, if *fructus perceptos facit suos usque ad sententiam.* I think not, for though the citation puts him *in mala fide* to dispone and alienate *rem litigiosam*, yet it puts him not *in mala fide* to possess ay and while your right be found better; seeing *dubius est eventus litis*, and till I see your right I think my own good. *See Mackeinzie's Observations on the act of Parliament* 1621, *page* 137.

Advocates' MS. No. 264, *folio* 114.

1671. *February* 21, and *November* 21. CORBET *against* ANNA MEINZIES, Relict of MAXWELL of WRAES.

February 21.—A woman pursuing upon her liferent infeftment, it was ALLEGED,—That the same could not be respected; because, by a clause in the contract of marriage, (which was the ground and warrant of her infeftment,) it was expressly provided that she should have no right to her liferent till L.1000 promitted in name of tocher were paid.

To which it was ANSWERED,—That this would have met the woman well, if she had been the party binder and contractor for her tocher; but *ita est*, it is not she but her brother that becomes obliged for the same; and it were a very hard and unreasonable thing to defraud a woman of her liferent, because through your own default ye have not recovered the tocher; let her have her liferent, and pursue ye as accords.

My Lord Advocate would admit her infeftment, notwithstanding of the said quality in the contract matrimonial; unless the defender would say that, *per eum non stetit* the tocher is not paid, and that he has used diligence for recovering the same, and yet cannot get it. *Advocates' MS. No.* 135, *folio* 90.

November 21.—In the action mentioned *supra*, No. 135, (the parties were one Corbet, compriser, and Anna Meinzies, Relict of Maxwell of Wraes,) there being *avisandum* to the Lords, anent the point there debated, viz. whether a woman should be excluded from the benefit of her liferent, because, by a clause in her contract of marriage, it was provided that she have no liferent till her tocher were paid; whose answer being reported this day, they found, notwithstanding of the said quality, the wife behoved to have her jointure; seeing *stante matrimonio* she could use no diligence for purifying the condition, and it was the husband's fault the tocher was not got in, for which the wife must not smart; unless they will say that he did diligence against the debtors to recover the tocher, but could not get it of them, or that *ex notorietate conditionis*, they were insolvent. *Favor matrimonii* is the cause of this. *Interest rei publicæ mulieres esse nuptas et sic dotatas; L. 2. de jure dotium.* Yet Gayl, *libro* 2, *observatione* 81, excludes the wife, unless she prove *dotem suam fuisse marito numeratam.*

Advocates' MS. No. 265, *folio* 114.

1671. *November* 14, and 21. COLLISONE *against* MEINZIES.

November 14.—This is a pursuit at the instance of an executor dative *ad non executa*, for payment of a sum owing to a defunct by ———.

It was ALLEGED,—No process at the pursuer's instance, because this sum to which he confirms himself executor creditor *ad non executa*, is not only confirmed in the principal testament, but it is also executed, in so far as the principal executor has recovered sentence against the debtor therefore.

REPLIED,—A sum cannot be estimated to be executed by a naked sentence recovered, unless he has also got payment, and discharged the same; for if it were executed by a sentence, then it should be *in bonis executoris*; if he died, it should be confirmed in his testament, and belong to his executors; if he went to the horn, that sum should also fall in his escheat, and belong to the fisk; with many other inconveniencies.

It was DUPLIED,—After sentence they are undoubtedly *in bonis executoris*, for this reason, he has all the acts of property and dominion that can be condescended on: he may uplift it, he may discharge it, and he may assign it; it will also fall under his escheat; in respect of all which there can be no place for a dative *ad non executa*. Neither is this a novelty, seeing the Lords have found the same frequently before, viz. betwixt Douny and Young, on the 10th of November, 1666; and lately, in 1670, in Mr. Arthur Gordon, Advocate, his cause against the Laird of Drum.

They were to have the Lords' answer on it.

Advocates' MS. No. 255, *folio* 112.

November 21.—The debate *supra*, at the 255th number, betwixt Collisone and Meinzies being reported this day, the Lords found the testament sufficiently executed by a sentence, and so there was no room for a dative *ad non executum*. It will also prove a great preparative for its falling under escheat, &c.

Advocates' MS. No. 266, *folio* 114.

1671. *November* 21. HERIOT of Ramorney *against* ———.

IT being controverted betwixt Heriot of Ramorney and , where a man who sells land, is obliged to give to the buyer a transumpt of the evidents before the Judge Ordinary, whether they might be transumed before the sheriff of the shire wherein the lands lie, or rather before the Lords;

It was ALLEGED,—The sheriff being a pedaneous judge, the Officers of State (who must of necessity be called, where transuming is intended of his Majesty's charters and other writs under the great seal,) are not obliged to compear before him.

It was ANSWERED,—The calling of them was only *dicis causa*, and signified nothing. 2*do*, If there were necessity for calling them, then it might be done even before the sheriff by letters of supplement.

It was REPLIED,—Since I had paid the full price and worth of the land, it is very just I should be pleased with the security; and, therefore, *ne quid scrupuli insit*, it should be done before the Lords; where, if any difficulty occur, the advice of men of law is at hand.

It was DUPLIED,—That *electio est debitoris*, and, therefore, he has the choice of the judge before whom the same should be done. Next, if they will have it before the Lords, then that the charger may bear what farther expense they will be at in transuming them before the Lords than they would be if they did it before the sheriff. They added, it was most ordinary to transume before inferior judges.

This being taken to the Inner House, the Lords found thir evidents behoved to be transumed before themselves: not because the Officers of State must be called, (for they would not dip on that at this time,) but because the buyer behoved to be satisfied with the security, and this made it more firm and uncontroverted: only they recommended to the clerks not to exact the full rigour of the regulation, (*viz.* L.3 for the sheet,) but to be gentle.

Sir G. Lockhart said the Lords were like to the miller of Carstairs, drew all to themselves. And truly this decision has no shadow of reason but the clerks' advantage.

Advocates' MS. No. 267, *folio* 114.

1671. *November* 23. SINCLAIR of Ratter *against* ———.

IT was debated in the case of Sinclair of Ratter against ———, if a man might pass by his father, who was infeft, and serve himself heir to his goodsire, who was also infeft, to the effect he might elude his father's creditors: or if the said passing over his father, and entering by his goodsire, be not a sufficient passive title to bind his father's debt on him, *tanquam gerens se pro hærede*.

It was ALLEGED,—It was not; and his possessing in right of his goodsire was at most but vicious intromission, and tied him only to restitution of what he had meddled with, or in *quantum lucratus est*.

The Lords, *in præsentia*, found a man could not pass by his father who stood last vested and seased, and enter to his goodsire; and that the doing thereof inferred behaviour, unless he could condescend on some pregnant presumptions that he was ignorant of his father's being infeft: which is *ignorantia facti*, and so *nonnunquam excusat*; though it may be called *ignorantia juris, unusquisque enim tenetur scire quæ sunt in publica custodia*, and should seek the registers.

Advocates' MS. No. 268, *folio* 115.

1671. *November* 23. ROLLAND of DISBLAIR, and OTHERS *against* CRAIGIEVAR.

IN the debate about the regality of Lundors, pursued by Disblair Rolland, Sir Patrick Young of Seaton, and others, against Craigievar; it was ALLEGED, that though they were indeed vassals of the Abbacy of Lundors, and so liable to that regality before the act of annexation in 1587; yet by that act, (and the act 13, *in anno* 1633,) they became vassals to his Majesty, and so became subject to the courts within the royalty; and accordingly, by the space of forty years and more, they had prescribed immunity from the regality court, and had given suit and presence with the sheriff.

To this it was ANSWERED,—That *jurisdictio nequit præscribi*. 2*do*, That some of the vassals of that regality, benorth the Cairnamont, have acknowledged the jurisdiction, and answered to the Court, and been amerciated for their absence; which use of some must interrupt the prescription *quoad* the whole. 3*tio*, In counting the forty years, the ten years of the English usurpation must not be reckoned, because, during that time, all regalities were suppressed. 4*to*, They offered to prove positive acts of interruption within the years of prescription.

The debate being reported, the Lords found immunity from jurisdiction might be prescribed, but they behoved to make up forty years beside those under the usurpers. They sustained likewise the reply of interruption for eliding their exception upon prescription, but found the exercising the jurisdiction *quoad* some did not interrupt *quoad* the rest.

There were sundry acts of homologation condescended upon, whereby they alleged thir persons had *tacite* acknowledged the regality; as their adjusting their proportions of stents and public burdens with the rest of the vassals of the regality, &c. But thir were referred to the mutual declarators, one of the right of regality, the other against it, as to their proper place.

Advocates' MS. No. 269, *folio* 115.

1671. *November* 10 and 24. SIR ROBERT BARCLAY of Peirstone, *against* LIDDELL and OTHERS.

November 10. PEIRSTONE having had dealing with one Robert King, tailor; after count and reckoning, King is found his debtor in L.1100; they agree that

Peirstone take an assignation to a bond of the like sum owing to King by Sir Francis Ruthven of Reidcastle, in satisfaction; only he warrants the assignation at all hands, and against all deadly. King dies, his relict marries to one Liddell, merchant. Peirstone discovering, after two or three years, Reidcastle's condition to be such that he would not easily recover his money, he comes back upon the representatives of his cedent, offers to repone them again to their own right, and craves they may be decerned to pay him the said sum, conform to the clause of absolute warrandice contained in the assignation.

It was ALLEGED It was now out of all controversy, yea become a maxim in law, that it imported not what were the warrandice inserted in an assignation or other personal right, whether the same were absolute or made only from facts and deeds; seeing in such it was all one thing, and had but one and the self same signification: and whatever way it was conceived, it was only interpreted to be from facts and deeds, and comprehended these two things and no more, *videlicet, quod debitum vere subest*, and that the cedent has undoubted right to the same, and such a right as will exclude all others from the said sum, and that he has not made, nor shall not make double assignations; but in no sense or law * does it import the responsality of the debtor, since the assignee takes that on his own peril, *et sic caveat emptor*, especially if the term of payment contained in the bond be come, and so if the assignee may instantly charge and distress for the sum; but if the term of payment be not come, then though strict law requires it not, yet *bonum et æquum* seems to say that the cedent shall warrant the responsality of the debtor till *dies solutionis* be come, or a term after: in which time, if he do no diligence for recovery of the sum, then *sibi imputet*, it is his own fault, it is just he suffer for his negligence; neither will any law ever allow him regress upon the clause of warrandice, for getting off the cedent what he cannot recover of him whom he once accepted to be his debtor. But we are no ways straitened in this case, to insist on the rigour of law; for not only here *debitum vere suberat*, and I the cedent had the sole undoubted right thereto, and consequently you my assignee, but also (which is more than we need to say,) Reidcastle, the debtor, was most responsal the time of the assignation. If you had but charged upon the bond, he would have paid the money: and he being debtor to you in far greater sums upon other accounts, ye got payment of them since this assignation, voluntarily, without the least legal distress; which is a clear demonstration ye might have recovered this lesser sum likewise, if ye had used any diligence. But what reason is there that I should stand bound for the responsality of a debtor, where ye have the power of application, where it is in your free will and option whether you will put him to it or no, so long as he is able? Is it anyways just that ye shall neglect to do diligence for recovery of it till the debtor turn insolvent, because, forsooth, ye judge yourself secure, imagining to have recourse back upon me? whereas if I had not made over the right to you, I would have done diligence *debito tempore* myself and gotten it. And that this is no novelty, appears, because there is an express decision already in it, betwixt *Wm. Hay* and ; wherein a cautioner paying the debt, and taking assignation to the bond, with a clause of absolute warrandice, the Lords found the creditor assigner not bound for the princi-

* And the civil law is most clear; l. 4 and 5 *D. de hæreditate et actione vendita; ibique* Mornasius, *in Commentariis.*

pal debtor's solvency, but allenarly that it was a true debt, and as yet unpaid *quoad* the principal. *Vide supra No.* 129, (*13th February* 1671.) *Codex* Fabrianus *page* 421, *definitione ibi* 15. See Stair's System, tit. 13. *Of infeftments of property*, No. 38, p. 220.

To this it was REPLIED,—They confessed that the ordinary clause of absolute warrandice in an assignation implied no more than from fact and deed, but contended they were in a different case; and it behoved to import more here, because he not only warranted the assignation and the right at all hands and against all deadly, but likeways the sums; which words can admit of no other sense but this, he shall be liable to make the assignation effectual,* *quocunque modo* it be rendered ineffectual, whether by the debtor's irresponsality or otherways. As for the practique it noways meets; because it is obvious to every body that a creditor getting payment from his cautioner (whom he assigns to the bond for his speedier relief) can warrant no more but allenarly the debt, and that it is yet unuplifted by him from the principal; and it were ridiculous to say he should be liable to refund the sum again to the cautioner, if he could not recover payment upon the assignation, which is noways our case.

My Lord Newbayth inclined to find the allegeance relevant, and to assoilyie from the summons; yet was content to give them the Lords' answer, whether a cedent giving absolute warrandice will be liable for the sum to the assignee, if the debtor was not responsal the time of the assignation.

Advocates' MS. No. 246, *folio* 110.

November 24.—The debate set down at No. 246, betwixt Peirston and Liddell, about the warrandice in an assignation, being taken to avizandum, the Lords, after long debates in their own presence, found (and declared they would make it a constant rule hereafter, for putting the lieges in surety,) that absolute warrandice in an assignation imported no more but allenarly that *vere debitum subest*, and that he is such a debitor *qui non est tutus ulla exceptione*, and that it is yet resting unpaid, and that no other has right to it; but noways imported the responsality or sufficiency of the debtor, and that it should be recoverable of him, or if ye cannot get it off him then ye shall recur against the cedent: and this notwithstanding of the specialties alleged, viz. That he not only warranted the right but also the sums. 2*do*, That he obliged himself to make it effectual. 3*tio*, That the law *non tenetur præstare locupletem sed tantum debitorem* was only *in emptione nominis*, in which case it is just the buyer take his hazard because he gets an ease in the bargain: *sed hoc non tenet in cessione seu delegatione.* All which the Lords repelled, and found *ut supra.* And, therefore, *pro futuro*, no assignation should be taken but expressly with this quality, that if he do not recover the sum by virtue of that assignation, then he shall recur again to the cedent, or that he shall make the debt good and effectual at all hands: and to make it equal on all hands, it should bear, the assignee always doing diligence within such a definite time as they shall agree upon; and the diligence would also be qualified, viz. the length of the registrate horning or otherwise, as they shall agree. And when one

* The word "*effectual*" has a great emphasis in it, though some call it but *stilus curiæ*, and that it imports no more than the words *good, valid, and sufficient.*

takes an assignation to a bond in corroboration of a debt owing him by the cedent, he will do well to advert what diligence he is tied to do.*

Before this decision many advocates were in a mistake as to the import of this absolute warrandice.

Peirston having lost the interlocutor, then offered him to prove it was communed and agreed to by this defender, that he should warrant the debt against all accidents that could befal it.

The Lords found this relevant to be proven *scripto vel juramento*; though it was alleged that he should not be heard to found on that now, because of his supine negligence in letting the debtor turn insolvent, and not putting him to it by the space of three years. *Advocates' MS. No. 270, folio 115.*

1671. *November* 28. HAMILTON of KINKELL *against* AYTON of Kinnaldy.

ONE pursuing for implement of a contract to which he had right, it was ALLEGED, I cannot fulfil to you, because your author is denuded by an assignation in favours of ———, who has intimated the same to me, and has recovered sentence. The Lords *in præsentia* found (they say it was found so before,) it was *jus tertii* to the debtor; and therefore repelled his allegeance, except he could show an interest.

ALLEGED he had good enough interest,—lest he be made pay it twice. The Lords found he should suspend on double poinding.

ALLEGED, it were better to receive it here than needlessly to multiply processes and charges. Yet the Lords found in form it could not be received here, but only in a double poinding.

This pursuit was at the instance of Hamilton of Kinkell against Ayton of Kinnaldy, as heir to his father *et cæteris nominibus passivis*, to fulfil a contract whereby he was obliged to dispone some lands to Kinkell's father, who assigned this contract to one Mr. Henry Danskein; who intimated his assignation, and pursued for transferring this contract against Kinnaldie *passive*, and obtained sentence. It was confessed by all, if Danskein had recovered sentence for implement it would have been a good defence against Kinkell's pursuit; but being only for transferring, it was not exclusive of the pursuer's right, unless Danskein's representatives did compear and propone on their right, and crave to be preferred; though it was alleged the transferring was equivalent to a decreet for implement, and would receive the self same execution as if it were for implement.

Advocates' MS. No. 273, folio 116.

* The Lords were also moved with the authority of President Spotswood, who in his practiques is of this opinion. There were also French *plaidoiez* and *arrests* adduced for it by my Lord Newbayth. See Peleus his *Actions Forenses singulieres, Lib. 5, Act. 15, pag. 259.*

1671. *January* 25 and *November* 28. SANDILANDS and MR. MATTHEW M'KELL and Her HUSBAND *against* Her CHILDREN and their TUTORS.

January 25. THIS is the relict of Bailie Alexander Sandilands, who married this Mr. M'Kell against all her friends' will. By contract of marriage betwixt her former husband and her, she was provided to a jointure: but it was not declared to be in satisfaction, nor was she debarred from terce and third. Whereupon she intents a pursuit, against her children and their tutors, for their interests, of declarator of her right to a terce and third.

Whereunto it was ANSWERED,—That she could never be heard to claim a terce, &c. because in that same contract which she hath assented to, there is a clause whereby the whole conquest during the marriage is provided to himself in liferent, and to the bairns of the marriage in fee; now what, shall the whole go to them in fee, if it bear a defalcation of a third to her? And therefore it must be interpreted to have been the meaning of parties by that clause to seclude her from it, seeing she is not named in the clause of conquest.

Whereto it was REPLIED,—That she was founded *in jure communi* which ordains wives to have a terce, unless the same be *per expressum* discharged; and she can never be supposed, by such tacit and remote presumptions, to be prejudged therein, especially considering that *in dubiis pro dote est respondendum.*

Notwithstanding whereof the Lords, *in presentia*, found her debarred therefrom by the conception of the foresaid clause; only found her to have right to a third of the household plenishing.

It was thought strange how they came to find her to have right to this last more than to the rest, since there is a like reason in all.

Advocates' MS. No. 108, *folio* 86.

28*th November* 1671.—Agnes Sandilands and Mr. Matthew M'Kell, now her spouse, against her children and Patrick Tailzefer, their tutor.

We find before at number 108, that in her pursuit for a third, the Lords found the clause in the contract of marriage, anent the conquest, did seclude her from any third of her first husband's means and moveables, except a third of the household plenishing. Yet, upon a supplication given in by her, the Lords found this allegeance relevant to give her an interest to a third of what superplus she should prove her husband had more than the L.10,000 added to her tocher, to make up her jointure, viz. that her umquhile husband, before and at the time of the contract of marriage with her, had more sums and other means and estate than the said L.10,000 contracted. For proving whereof there was an account produced, of L.10,000 more, which they had alleged he had at the time of the marriage; and for instructing of it produced sundry memorandums under the defunct's hand, wherein he makes an estimate of his own estate.

Against which many things were OBJECTED, as making no probation of his fortune, viz. either they are not written with the defunct's own hand; or are two years before his marriage, and so cannot prove what he had the time thereof; or were given up largely by him to be a ground of credit to him, being a young man and a merchant, and to be an inducement to his uncle, the Dean of Guild, to give

him a greater tocher; upon which account he might also omit or conceal his debts; or they are desperate sums, or sums owing by bonds bearing annualrent, and so heritable *quoad relictam, &c.*

Advocates' MS. No. 274, folio 116.

1671. *December* 1. CRICHTONE *against* CARRUTHERS of Hoilmaynes.

IN this cause the Lords found,—where a man had got a tack of lands, and the same was delivered blank in the ish or endurance of the tack, only the receiver of the tack grants a back-bond of the date of the tack, declaring that the tack was set for nineteen years. Thereafter he fills up eighty years in the tack, and assigns it for onerous causes to a third party. Which third person, after the elapsing of the nineteen years, is warned to remove. He defended upon his tack for years yet to run. REPLIED,—His author, by back-bond of the date of the tack, (and so is *pars contractus et pactum incontinenti adjectum,*) confesses he had got it blank, and that it was to endure but nineteen years. DUPLIED,—The back-bond is nothing to him; who, seeing a simple tack relative to no back-bond set for eighty years, he was in *bona fide* to take a right thereto, and had paid a sum of money therefore; and that the pursuer justly suffered, in trusting his cedent with a blank tack.

The Lords found the back-bond could not meet the singular successor, but that the tack behoved to stand good for all the years filled up in it *quoad* him; unless the pursuer will say that the assignee was *particeps fraudis*, and knew then of the back-bond.

The advocate fought mightily against this interlocutor; but in my humble opinion it was *bene judicatum.*

Vide Dury, 21st December 1621, L. Barnbarro. *Vide supra, 25th February* 1671, *numero* 154.

Advocates' MS. No. 275, folio 116.

1671. *December* 1. HOME and PRINGLE *against* ——.

THIS is a pursuit at a relict's instance, for removing from some lands whereof she was liferentrix.

ALLEGED,—I cannot remove, because having lent a sum of money to the pursuer's husband, he had granted him an heritable right to the said land, to be bruiked by him aye and while the sum lent were repaid to him.

REPLIED,—That right was null, and notwithstanding thereof he must remove; because, though it bore these words, "sets, wadsets, dispones, and annalyies," and though it bore an yearly duty to be paid to this pursuer as a tack-duty, yet in effect it is neither a wadset nor a tack. A tack it was not, because it wanted a definite ish. A wadset it could not be, because it bore no precept of seasine or ob-

ligement to infeft; which, though it had carried, yet it could never have defended, because no seasine was ever taken thereon.

DUPLIED,—This relict can never be heard to quarrel the right alleged on, because she has homologated the same, in so far as she received the tack-duty of sundry years bygone, and so has acknowledged the tack. *2do*, It is a formal enough tack; and for the pretence that it wants an ish, the same ought to be repelled, because it has a most expressive ish, viz. when the sum shall be paid; and offered to adduce sundry practiques where this was sustained, and namely, one *in terminis* out of Dury, on the *25th of January* 1625, betwixt *Ronald* and *Strang*.

TRIPLIED,—The pretended homologation is ridiculous, seeing it imports a deed of one's own; and none can homologate the deed of another unless he represent that other; now there was no deed of the relict's here that she could homologate, the tack being set by her husband, (if so be it be one,) and she being no party therein. As to that part of the duply alleging the tack to be valid, and to have an ish, because it bears aye and while the money be repaid, and the practiques for the same, Triplies, They have contrary practiques more pregnant; for, *first*, they have five to one; *2do*, They have a late one, viz. in 1664. As for Dury, he is clear in the *12th of July* 1621, *Laird of Muckhall*.

The Lords did not determine this point about the validity of the tack, because they found the writ a wadset, and so null *quoad* the relict, because not made real by infeftment.

Ex multitudine authorum quod melius et æquius est non est judicandum, cum possit unius et deterioris sententia alias omnes superare; Justinianus, *in constitut. de conceptione Digest.* Yet in Italy, where they judge by the opinion of the doctors, he who brings maniest, providing they be classic, wins the cause.

Advocates' MS. No. 276, *folio* 117.

1671. *December* 1.

THE Sheriff of Stirling having granted a precept for arresting a sum in the hands of , who dwelt within the bounds, and this precept being executed against him, personally apprehended, but within another sheriffdom, it was much questioned if the arrestment was validly executed, seeing it was *extra districtum seu territorium*, and so should have been done by letters of supplement; for an execution at the dwelling-house, in this case suffices not. I think it was illegally done.

Advocates' MS. No. 277, *folio* 117.

1671. *December* 5. MR. ARCHIBALD STEWART *against* WIELAND.

MR. ARCHIBALD STEWART, son to the Countess of Murray, alleging and suspecting one Wieland, a servant of his mother's, to be an ill instrument betwixt

his mother and him, causes him at a time grant a bond obliging himself, under the pain of 1000 merks, to remove from the countess her service at Martinmas last. He being charged upon this bond to pay the penalties, the poor man deals to get a suspension; and the Ordinary hearing the parties upon the bill, Wieland craved the charge might be suspended, because he would not dip upon the way of extorting the bond from him, but offered present obedience and implement thereof.

To which it was ANSWERED, He had incurred the penalty, and could not offer obedience now; seeing he had staid in the house ten days after the term at which he obliged himself to remove, and yet haunted the house to the charger's prejudice.

REPLIED, Ten days was *modica mora*, wherein *non est prejudicium*; that such obligements are not to be taken *judaice* but κατα συγγνωμην; that his going to the house since deserved no censure, being a part of that freedom competent to all the lieges of going where they please, especially seeing he serves no more there.

The Ordinary inclined to find the charge calumnious. Yet the Lords in presence found he should pay the penalty of the bond, if he had contravened the tenor of it.

Advocates' MS. No. 280, folio 117.

1671. *December 5.* MR. JOHN ELEIS, elder, *against* WISHAW.

THIS day I understood of a practique found some space ago by the Lords, betwixt Mr. John Eleis, elder, and Wishaw, about an inhibition, the style whereof expressly bears that the party inhibited grant no renunciation of rights to his debtors. Notwithstanding whereof the Lords found, where a person inhibited had a wadset-right in a man's hands, the wadset giver might pay the money, and take a renunciation from his creditor, who stands inhibited at the instance of his creditor again, notwithstanding the inhibition, which reaches not to that case, since the way to affect that wadset is only a comprising. Siclike it is only *stilus curiæ*, where the inhibition bears that he dispose upon none of his moveable goods and gear; whereas an inhibition is only for heritage. *Quæritur*, If inhibition will reach against a bond bearing annualrent payable to heirs and assignees, (secluding executors,) for such bonds by act of Parliament in 1661, are declared to be heritable; if they be, then I think the inhibition will not extend to them, unless it be published at the market-cross of the head burgh of the shire where the debtors by the said bond live. *Quæritur*, If a man inhibited may assign an heritable sum for payment of a debt contracted by him *ante inhibitionem*, or if the said assignation will fall *ex capite inhibitionis*. It seems he may, because a man inhibited may pay a debt, though it be heritable. *Ergo*, he likewise may assign for payment, especially where it depends upon a cause *ab ante*. Though it may be answered, the reason why such payment comes not to be questioned, is because of its latency, by which it comes not to the inhibiter's knowledge. Yet if the debtor be bankrupt, then, by the 18th act of Parliament in 1621, he cannot gratify his

creditors by preferring one to another, and so prejudge the anterior diligence of any. When a man is to be esteemed bankrupt, whether *quando debita excedunt bona*, or when he has a *bonorum*, or when he lies registrate at the horn year and day, or when he is registrate though year and day be but *in cursu, in medium relinquo*. The Lords have oft now found that an inhibition reaches *non solum bona immobilia presentia* belonging to the debtor at the time of the serving the inhibition, but likewise *omnia futura et acquirenda*, all heritages he conquishes thereafter during his lifetime. *Vide* Hadington, *23d Feb.* 1623, *Seaton* against *Moriston*. It may be said a man inhibited cannot assign nor discharge a reversion; *ergo*, neither renounce a wadset. I answer, the difference is very wide; the assigning or discharging a reversion is a voluntary deed, whereunto he cannot be compelled; whereas the taking his money and renouncing his right, is a deed which he is either actually compelled to do, or at least may be by virtue of the obligement given by him for reversion.

This case is now determined by the printed act of Sederunt, *19th February* 1680. *Vide supra No.* 191, [*30th June* 1671.]

Advocates' MS. No. 281, *folio* 118.

1671. *December 5.* Sir William Bennet of Grubet *against* Moir of Otterburne.

In the reduction pursued at the instance of Sir William Bennet of Grubet against Moir of Otterburne, of the said Otterburne his right to the lands of Greinlaw; it was alleged for the defender, That he brooked Greinlaw as part and pertinent of his lands of Otterburne, within which it lay naturally and locally.

To this it was answered, That the Youngs of Otterburne, authors to this defender, were only kindly tenants for this roum to Sir John Ker of Litleden, whose right the Earl of Louthian having acquired, he disponed the same to this pursuer's father; and for proving this, the disposition made by the Youngs to Mr. William Moir of Greinlaw clearly evinces, for they dispone only their kindness of the said roum. *2do*, It is offered to be proven that the Youngs did service to Litleden for the said roum as kindly tenants, by riding and otherwise, and that they were poinded for not riding when required.

Replied, Their disponing the kindliness of the roum *non relevat*, seeing an heritor may discharge and renounce his kindness. *2do*, Their service of riding, and their being poinded for not riding, *non relevat*, unless they say it was for thir lands; whereas the defender offers him *positive* to prove that they were tenants to Litledean in other lands, and it was for that they rode and were poinded.

The Lords ordained both of them, before answer, to lead witnesses upon their several allegeances. And a commission being granted for that effect, the deposi-

tions of sundry witnesses for both parties were taken and reported. The Lords falling to examine the witnesses, there were many things objected against Grubet's witnesses: some of them common beggars, others living on the poor's box; one got a boll of meal from Grubet to depone; one at his death declared much sorrow, and craved leave to rectify the deposition he had made in that affair, and several of them were vitiated and blotted. The Lords found they would re-examine the witnesses yet on life, and any others that either party would adduce.

In this process there was a declinator given in against the advocate, because the pursuer and he had married two sisters. The Lords did not receive it; but it miserably cruciated the advocate to see his justice called in question. In 1678 Newbyth sat and voted in Mr. Patrick Home's cause, though he had married his brother's daughter. *Infra, July* 1676, *No.* 492, § 3.

Advocates' MS. No. 283, *folio* 119.

1671. *December* 5. WILLIAM DUFF *against* FORBES of Cullodin.

THIS was a competition about the rights of some fishings which *held feu of the* burgh of Innerness.

ALLEGED, Against Cullodin's seasine thereof that it was null, because it proceeded upon a resignation in the hands of the magistrates and council of the town of Inverness, and the seasine was only subscribed by one bailie and the clerk, (for by an inveterate custom past all memory of man, used within this burgh, contrary to the use of all the rest of the kingdom, the feuars and vassals of the said burgh get no charters, but allenarly a seasine on their resignation, signed by the haill magistrates of the town;) whereas, by the custom of the said burgh, it should have been subscribed by the haill magistrates, as Duff's is.

To this it was ANSWERED, That the manner how Duff's seasine was given was as much contrary to the common form received in other places, as the manner wherein Cullodin's was given, seeing he had no charter to shew no more than Cullodin. And as for that pretended nullity of his seasine being only *signed by* a bailie and the clerk, he offers to prove it is a more general, more universal, and more received custom in the burgh of Inverness than that other, of being subscribed by the haill magistrates.

Whereupon the Lords granted a commission for trying which of the two was the custom of that burgh, and if both of them were in use, which of them predominated and prevailed most; which being reported, and the report coming to be advised, the Lords found more instances adduced of seasines given after the manner of Cullodin's than of the other, (one bailie doing it *ex presumpto mandato reliquorum,)* and, therefore, declared they would sustain Cullodin's seasine, and all seasines given before the date of thir presents, either after the one manner or the other, they being both equally informal, because *in talibus error communis facit jus*; but *pro futuro*, they would make an act of sederunt, inhibiting all such customs of giving seasines which are either contrary to, or derogatory and exorbitant from the common and municipal law; under certification, that whatever resigna-

tions or seasines shall be made otherwise, they shall be void and null in themselves. *Vide infra, No.* 370, [*Suitty* against *Bell, July* 1672,] *and* 381, [*Magistrates of Inverness* against *Forbes, &c. Dec.* 1672.]

Then Duff offered to prove simulation, because it being a disposition *inter conjunctas personas, videlicet,* Cullodin and his brother, it wanted onerous causes. To this it was ANSWERED, — That the disposition bore for onerous causes. *2do,* He was content to make faith upon them. *3tio,* If this would not satisfy, he offered to produce the bonds and discharges of debts he had paid as cautioner for his brother, far above the worth of their fishings.

The bonds being produced, they offered to prove one of the bonds were included in the other, and so they were not distinct sums.

ANSWERED, The dates, terms of payment, and all are different.

They likewise objected simulation, on this head, that of purpose he caused his seasine only be subscribed by one bailie, and kept beside the clerk a twelvemonth after, that it might be latent and come to the knowledge of few, and so the lieges not knowing thereof, might be ensnared to contract with his brother. ANSWERED, It was so far from being collusion or design, that the clerk being his enemy, kept it from him against his will, and he was forced to charge him with horning ere he could get it up.

The Lords ordained Cullodin to depone upon this last allegeance, who altogether denied it.

Advocates' MS. No. 284, *folio* 120.

1671. *December* 5. ANENT INTERRUPTIONS OF PRESCRIPTION.

I HEARD it doubted amongst the advocates, whether or no a bond or evident was prescribed, whereon nothing was done within the forty years but a naked charge to enter heir raised and executed, or if the said charge was sufficient to interrupt. I humbly think it was not a sufficient interruption, because the act of Parliament seems to require an express citation provoking to judgment; now a charge to enter is not a judicial act but only preparatory. *2do,* Such charges are general, and seldom condescend on the special actions the charger has to intent; and, therefore, seem not to induce *malam fidem,* unless we would say that there was nothing else betwixt you and me save this right now questioned as prescribed. But the 10th act in 1669 clears what interruptions are lawful now; for, in time coming, they must be citations executed by messengers at arms, and must be revived every seven years. *Vide supra, number* 215, *(July* 11, 1671, *Macraw* against *M'Donald;) and* Gaillii *observationes, libro observat.* 67 *and* 76.

Advocates' MS. No. 285, *folio* 120.

1671. *December* 8. MR. GEORGE SCOT of Giblieston *against* MR. JOHN ELEIS, Elder, of Eleiston.

THIS was a suspension and a reduction of a bond of L.1182 granted by Mr. George to Eleiston, upon reasons coincident, viz. that the bond was elicited from him by Mr. John, being his tutor and curator, some few months after his majority, and so when he was *in confinio minoritatis*, and at the very time when Mr. George was going to subscribe his contract of marriage, and so *æstro amoris percitus*; wherein he refused to concur with him, unless he had subscribed this bond. *2do*, That it was a bond granted by a pupil to his tutor and curator *ante redditas rationes*, and so must be presumed to be satisfied out of his superintromission, and therefore Eleiston must count over again. *(Vide* Dury, *July* 4, 1635, *Monimusk.)*

To thir it was ANSWERED,—That this *confinium* is *inauditum in jure;* it having been frequently pled why bonds granted within few months of majority should sustain, but never that a bond granted after the arriving to complete majority should be null; there is a *confinium intra, sed nullum extra.* To the *second* the same is wholly ridiculous, seeing *1mo*, Eleiston was never his tutor; *2do, esto* he had been, it were a most dangerous preparative to permit minors, after their majority, counting with their tutors or curators, and discharging them, or homologating their actings, either *quoad* the whole or a part, and retiring the instructions of the account, to be reponed against the same, and to make them count again *de novo;* which is directly Eleiston's case. See more of the dispute in the informations with me.

Which being taken to interlocutor by Craigie, the Lords repelled the *confinium majoritatis* and circumvention, with the reason of suspension and reduction founded thereon, against the discharge of the account, and bond granted for the balance thereof; and find the letters orderly proceeded, notwithstanding of these reasons; and find that reason bearing that the charger being tutor to the suspender has not yet made his tutor counts, and so is presumed to have as much of the minor's means in his hands as will compense the sums charged for, relevant *ad hunc effectum* to stop execution at the charger's instance till the event of the tutor's counts, that *inde* it may be constant if he has as much of the suspender's means in his hands as will compense the sum charged; and for that effect, ordain the parties to count before; but prejudice always to the charger's lawful defences, why he ought not to count as tutor to the suspender, and in case it shall be found he ought to count as tutor, yet he shall not be holden to count for any thing contained in the fitted account for which the foresaid bond was granted. And the Lords ordain the charger to give his oath if he has in his hand any instructions or verifications of the articles of the former fitted account, and to deliver up to the suspender what he has of the same.

Advocates' MS. No. 286, *folio* 120.

1671. *December* 8. The ARCHBISHOP of ST. ANDROIS *against* PATRICK LINDSAY of Wormeston, his Commissary.

THIS was a pursuit against the Commissary for relieving the Bishop of L.303, as his proportion of the contribution-money due to the Commissaries of Edinburgh of all years since 1661, and in time coming.

ALLEGED, there can be no relief; because they have never been liable therein *de facto*, nor in law can be; neither by the decreet arbitral are they, but the Bishops themselves, burdened with that 900 merks of augmentation given to the Commissaries of Edinburgh, upon the account of the loss they sustained through the want of the great testaments; and as for the old duty which was 1200 merks paid to them, the subject matter of that was ever the quots, and when the quots were in Queen Mary's hands, and after given to the Lords of the Session, this 1200 merks was ever paid furth thereof. As for the act of Parliament 1609, and the injunctions following in 1610, and the late injunctions in 1666, ordaining the Commissaries to relieve their Bishops of the contribution-money, they can never bind this defender, because the injunctions 1610 did not keep within the bounds limited for them by the act of Parliament 1609, which was only to set down the manner of the Commissaries proceeding with the forms of process, and in so far as they deviated from that they are without a warrant. *2do*, The said injunctions 1610 were never *in viridi observantia quoad* this relief. *3tio*, The injunctions 1666 are, since the defender's gift *et jus quæsitum*, which cannot be burdened without his own consent. *4to*, The most that all these acts and injunctions can infer is allenarly that the Commissary relieve him of his proportion of the 900 merks of augmented money. But there is no ground for relief of the old duty, which was ever paid out of the quots, and so by the Bishops who received them.

See the answer to this in the informations; as also about the Bishop of Glasgow's decreet against his Commissary, and the act of Parliament procured by the Commissaries of Edinburgh for paying their fees out of the Bishops' rents.

After many hearings, the Lords, before answer, ordained the decreet-arbitral to be produced.

Then the matter was trysted. The Commissary was content to relieve the Bishop of the whole for the future, and the Bishop was to procure to him a general discharge of all bygones from the Commissaries of Edinburgh.

Advocates' MS. No. 287, *folio* 120.

1671. *December* 8. Mr. ARTHUR GORDON *against* the LAIRD of DRUM.

IN this action it came to be debated, whether or no an executor going to the horn after the recovery of sentence against the defunct his debtors, but not of payment, whereon his escheat is gifted, if the donatar will have right to the said sums contained in the sentence yea or no? It was CONTENDED he would, because by the sentence the dominion of the executry goods was established in the person of the executor, so that he dying after sentence, they neither ac-

cresced to the co-executor, nor were there any place for a testament *ad non executum*, but the said goods fell under and behoved to be confirmed in the executor's testament *tanquam in ejus bonis*; which the Lords have found already in this and in another like case betwixt *Meinzies* and *Collisone*, *quod vide supra*, *num.* 255. After sentence, the executor has all the acts of property imaginable; he may uplift, assign, discharge, or dispose on them for payment of his own debt; he is *hæres in mobilibus*; by the sentence there is a judicial novation of the sums, by which they cease to be the means of the defunct, and become the proper goods of the executor, just as if he had taken a new security therefore in his own name. Thir goods must fall under the escheat of some, else rebellion should go unpunished *et rex careret injuriæ suæ solatio*; not of the legatars or nearest of kin to whom the executor is accountable, because they have only a personal action for these goods, at least a tacit hypothec in them, and so *non sunt in eorum dominio*; *ergo*, they must fall under the escheat of the executor. If executry goods, after sentence, were assigned, and not uplifted by the assignee, and he pass to the horn, they would fall under the assignee's escheat; even so, under the executor's own escheat; *tantum potest aliquis delinquendo quantum cedendo*: and so as the executor may transmit the goods by a voluntary assignation, so he may by an alienation *contra votum*, or by delinquency; yea more will be conveyed by delinquency than by a voluntary deed. The full and absolute administration of the executry goods, especially after sentence, is so centred in the executor's person, that it is transmitted to his executor, and the legatars and nearest of kin have no other interest for their security but in the personal obligation of the executor and his cautioner. By all which it most evidently appears that the executor is *dominus bonorum mobilium*.—See Balmano's practiques *voce Rebels*. *January* 17, 1632, *Miller* and *Lindsey*.

To thir it was ANSWERED, that by the first original of executors, by the act of Parliament in 1617, by their finding caution to make the goods confirmed forthcoming to all parties having interest, viz. to creditors, legatars, and nearest of kin; as also, by the whole nature of the office, it is more than evident that it is only *nudum ministerium seu fideicommissum* in the person of the executor; and if he be *hæres* it is only *analogice et improprie*, *videlicet hæres fiduciarius et gravatus restitutione*: and Craig himself says, *a curatore bonis dato non multum differt*; and so he is *nullo modo dominus mobilium*. * Which also will more fully appear from thir instances: He can have no other right than what the defunct had at the time of his decease, at which time the defunct could dispone upon no part of his moveables, but only his own part; and so the executor can be in better case than the defunct's self was. *Dominus bonorum* may assign his own goods without any onerous cause, he may gift them, and none can quarrel it; but an executor cannot give away the executry goods without an onerous cause, or if he do, the legatees and others interested, either arresting or complaining of the fraud will ever be preferred to the executor's assignee. *Dominus bonorum* may swear upon any allegeance referred to his oath, and the same will prejudge; but an allegeance cannot be referred to an executor's oath to bind any debt upon him in

* *Videatur omnino l. 3. p. ult.; l. 6. p. 3tio; l. 17. p. 5to. D. ad Senatus-consultum Trebellianum; l. 12. D. de fideicommissariis libertatibus; l. 48. p. ult. et l. 49. D. de jure fisci; l. 1. C. Pœnis fiscalibus creditores præferri.* See the question here almost *in terminis* debated by Joannes Vandus, *libro Variarum Quæstionum 2do, cap.* 23. *Vide infra*, November 1667, *No.* 647, § 3.

prejudice of the nearest of kin and others interested; his discharging and assigning import no property; seeing these be acts which may be done by factors, tutors, or any administrator of other men's affairs. If a factor uplift a sum or recover sentence for it, yet it ceases not to be the constituent's, neither will they fall under the factor's escheat. If one were infeft for his own behoof, and the interest of several other persons *per expressum*, this trustee's rebellion or treason would not forfault the whole in prejudice of those to whom by the quality of the infeftment he is countable. So neither can the executor's rebellion prejudge those to whom by the express quality of the confirmation (which is his only title for intromission,) they must be made forthcoming. As for the axiom *tantum luendo quantum agendo*, it is only true where *delinquens est vere et proprie dominus*, which is not here. The finding of caution gives not the executor the right of dominion in the goods; 1*mo*, Because that is only an accessorian security, and the executor stands first and primarily liable. 2*do*, No stress can be laid on thir cautioners, since no care is had in receiving responsal persons;—a footman will be received for a very great inventory. And, by the common law, legatars had so great interest *in hæreditate defuncti*, that if they were *legatarii certæ speciei* they had *rei vindicationem*, which was only conceded *rerum dominis*; in other legacies *licet de manu hæredis capiebant*, yet they had not only their *actio personalis ex testamento, quasi tacite contractum fuisset cum hærede*, but also *actionem hypothecariam: Parag.* 3. *Institut. de Legatis.* Now *fideicommissa** (of the which kind the office of executry is,) being *per omnia* exæquat *cum legatis*, what actions were allowed to the legatars the same are consequentially due to him *cui ex fideicommisso hæreditas vel ulla ejus pars restitui debet*, and consequently to the nearest of kin and others against the executor. And where any thing was legat *veteribus formulis per vindicationem et per præceptionem, dabatur legatariis actio in rem.*

This point was reasoned from thir and many other excellent mids, whereof see some in the informations.

The Lords found no such dominion to be in the person of the executor, as, he being rebel, to make the executary goods fall under his escheat, except as to his own share, the third of the dead's part.

Vide infra, No. 377, *December* 1672, *Lord Lyon* against *Feuars of Balveny.*

Advocates' MS. No. 288, *folio* 121.

1671. *December* 8. The COUNTESS of BRAMFORD, LORD and LADY FORRESTER *against* The EARL of CALLENDER.

THE Earl of Bramford being forefaulted in 1645 for his loyalty to his Majesty, and having L.40,000 upon infeftment, out of my Lord Erroll's lands, the same was assigned by the then States to my Lord Callender, and he accordingly uplifted the same. This forefaulture, as horribly unjust, being *funditus* rescinded in 1661, *per modum justitiæ*, and the Earl and his heirs reponed against the same; as

* This was excellently well decided, though to the prejudice of the fisk, *contra quem qui in dubiis respondet, non erat; l.* 10. *D. de jure fisci;* and as Plinius says of Trajan *in Panegyrico* page 110, *Quæ præcipua tua gloria est, sæpe vincitur fiscus, cujus causa mala, &c.*

also, by an act in 1670, the intromitters being declared liable: upon thir grounds Callender is now pursued by the Countess of Bramford, and her daughter, the Lady Forrester, and my Lord, her husband, for his interest, (who have right from the deceased Earl of Forth,) to repay the foresaid sum intromitted with by him, and the annualrents thereof since that time.

ALLEGED for Callender, 1*mo*, He is secure by the act of indemnity declaring intromitters with public monies not liable. 2*do*, A restitution against a forefaulture restores to lands, but not to monies where the same is consumed; it being *res fungibilis et quæ usu quasi consumitur*, and must be considered not as the money of the Earl of Bramford, but as the money of the States, who acted conform to the power then standing, and ordered their General Commissary to receive the same. And though Callender got it immediately from the debtors, and not from the General Commissary, by which it would seem not to have been redacted *in fiscum*, yet this being only to spare a telling *et per fictionem brevis manus*, it was all one as if he had got it from the public; with whose money being once confounded, he was not obliged to take notice whose it was, unless he had been accessory to the forefaulture, which he was not: neither is he obliged to debate the public right whether it was good or not, seeing they had so much of a present right and title by reason of the forefaulture, that was more than sufficient to purge the possession of the money and the simple act of numeration (the same being uplifted by warrant, and without any violence,) from all vitiosity. And he is no more obliged to debate the public's right, than he who has paid to an heir, but whose service is afterwards reduced; or to a man having a decreet which is afterwards annulled: in neither of which cases will the payer be found farther liable. And if intromitters, by virtue of a coloured title, were put to restore, it would stop all commerce amongst men. 3*tio*, By an act in 1647, Bramford was restored again to his honours, lands, and dignities, but with this quality, that he should never seek these sums which were meddled with either by the public or others having their order. Which restitution he homologated, and so neither he nor his heirs can recur. 4*to*, The pursuers can have no action, because by the act in 1661, Callender is exonered, at least it is only declared he shall be obliged to relieve Errol in case he be distressed, which case can now never exist, Errol being discharged by act of Parliament in 1670; and so *sublata principali, tollitur accessorium.*

See the replies to thir allegeances in the informations beside me.

The Lords after a long and full debate, found Callender ought to restore the principal sum, as he who intromitted therewith.

Then Bramford insisted for the annual-rents. ALLEGED, no annualrents can be paid, because *usuræ debentur tantum ex pacto*, and there was none here. 2*do*, *Bonæ fidei possessor fructus consumptos facit suos, nec restituere cogitur*, in which case Callender is.

REPLIED,—The sum lifted by him out of Errol's hand was upon annualrent, and so *omne turpe lucrum* which Callender had upon that account *ei est extorquendum*, and Bramford's posterity must be redintegrat *cum omni causa.*

The Lords were unwilling to determine upon the annualrents, but recommended to the parties to see if they could settle betwixt themselves, between and which if it should take no effect, then they should likewise advise the dispute anent the annualrents. At last, when they could not agree among themselves,

the Lords decerned for all annuals of that sum owing by the debtors, the time of the forefaulture, and for the annuals thereof since the restitution *per modum justitiæ* in 1661, and assoilyied from the rest. This will make about the half of the annualrents.

Then Bramford insisted against the Laird of Carse for repayment of L.20,000 received by him out of Bramford's forefaulture. ALLEGED,—1*mo*, He was an infant when it was paid. 2*do*, It was given for most onerous causes, viz. either for fees and other public service done by his father as Justice-General, or was real lent money to the States, which also they instructed. The Lords found whatever was given upon the account of service must be restored, and therefore decerned for that; but what was given for payment of borrowed money they demurred longer on it, yet at last they found no causes, how just and onerous soever, of sufficient strength to stand against the rescission of that unjust forefaulture, and therefore they involved Carse's principal under that same very fate with Callender's; and sic like, for the annualrents recommended them to agree.

Kinghorne, who got 15,000 merks of that forefaulture as the price of meal, forecasting the horoscope of his affair, and fearing the speit wherein he saw things running, he submitted the difference betwixt him and them to my Lord Chancellor.

Advocates' MS. No. 289, *folio* 122.

1672. *January* 3.

A WOMAN pursuing for a sum provided by bond to her husband and her, the longest liver of them two, his heirs, executors, and assignees; and it being ALLEGED she could not uplift the sum, the fee terminating on her husband's heirs, my Lord Advocate found she might lift the sum, she confirming before sentence, because it was moveable.

In such cases the Lords will ordain the sums to be given up to her, she discharging with absolute warrandice, or finding caution for the right employment of the sum, or confirming.

Advocates' MS. No. 290, *folio* 122.

1672. *January* 3. Anent INFERIOR JUDGES.

THE King's Advocate also refused to advocate a cause from the bailies of Edinburgh, upon this reason, that the question dipped upon double rights and infeftments, and their competition, whereto inferior judges were incompetent; yea, with indignation, he remitted the cause, and declared when he was assessor to the town he had advised twenty such rights, and they were competent enough to them.

Advocates' MS. No. 291, *folio* 122.

1672. *January* 10. Anent Donatars to Escheats.

A donatar to the escheat of a rebel, lying over by the space of a year, or any such like time, without declaring his gift, and so suffering the rebel to continue in possession, this *retenta possessio* was found a great presumption whereupon to infer the gift to be simulated, and to the rebel's behoof; and therefore where the donatar does not diligence to put the rebel from the possession, the Lords will prefer another who has taken a second gift, or any other competing on a right of itself not preferable. *Infra January* 1676, *No.* 457.

Advocates' MS. No. 292, § 1, *folio* 123.

1672. *January.* Anent Ministers' Stipend.

It was questioned amongst the advocates, whether the bygones of a minister's stipend was *debitum fundi*, yea or no. Some thought all burdens imposed by a public law and act of Parliament became *debita fundi*. Of this I doubt much. It was remembered that by the 45th act of Parliament in 1649, ministers' stipends and university rents resting owing for three years allenarly, should affect the ground against singular successors. But it was considered that this Parliament, and the haill acts thereof, were repealed; and though the said 45th act was revived by the 20th act in 1663, yet any who will take pains to compare the two acts will find the said act 45 is only renewed in what it orders anent the shorter and more summary way of poinding for ministers' stipends, and in order to their manses; but the Parliament seems *de industria* to have omitted that part about their stipends owing for three years to affect the land, as also that part, what shall be the least proportion and quantity of a minister's stipend. Which two questions, if they should be started now, I think the Lords would not follow the direction of that 45th act of Parliament, because antiquated. *Quæritur* if the annuity be *debitum fundi?* I fear, because it is the King's concern, it should be so found.

Advocates' MS. No. 292, § 3, *folio* 123.

1672. *January.* Anent Denunciation.

The Lords have found the denunciation of lands to be apprised lawful, though used a year and a half after the date of the letters of apprising; and though they commonly find citations in relation to processes whereon nothing follows within year and day, to be peremptory of that instance, *et annali spatio tolli seu extingui*, yet they find not the same in executorials. (And even this has no imaginary reason but the benefit of the signet, See *24th July* 1665. *Row* against *Viscount of Stormond.)* Hence, *Quæritur*, I charge one upon a decreet, year and day

passes without any farther, if after the year I may poind, or if I must give a new charge before I can poind, seeing the first charge may be presumed to be forgot.

Advocates' MS. No. 292, § 4, *folio* 123.

1672. *January* 10. JAMES JOHNSTON *against* LORD BELHAVEN.

MY Lord Belhaven being pursued upon a bond of his father's by James Johnston, he ALLEGED the same was prescribed, because nothing was done thereupon within forty years. REPLIED, the same was registrate within the forty years.

The Lords found registration allenarly not a sufficient interruption of prescription. *Vide* somewhat like in Dury, *27th November* 1630, *Laird of Lauder* against *Colmeslie*.

Advocates' MS. No. 298, *folio* 123.

1672. *January.*

ON being pursued to pay a sum, it was ALLEGED, No process upon the second summons, because executed against the defender to compear within twenty-four hours; which, though it be lawful where the party summoned dwells within the town of Edinburgh, yet cannot be extended to the Canongate, where this defender was the time of the giving the citation, and being a stranger was going to his house: and albeit the Canongate lie within the privileges and liberties of Edinburgh, yet that is not enough to extend this privilege of summoning upon twenty-four hours to them, else the same might be said of Leith, which were absurd. ANSWERED, 1*mo*, The Canongate lies within the town's liberties. 2*do*, The reason of the privilege is the propinquity and nearness to the Court of Justice, which holds as well in the Canongate as in Edinburgh; and on this account if one within Lothian be cited to compear within three days the citation will be sustained.

The Lords found him lawfully cited, and extended it to the Canongate.

L. 139. *D. de V. Significatione, Sub nomine urbis veniunt suburbia; L. 2. ff. de V. significatione.* And in 1570 a Parliament being summoned to compear at Edinburgh, it was resolved by the lawyers that it might legally hold in the Canongate. See Spotswood *ad num.* 1570, page 252.

Advocates' MS. No. 294, *folio* 123.

1672. *January* 10. The EARL OF NITHSDALE *against* the TENANTS OF DUNCOW.

IT was ALLEGED against a pursuit, that the pursuer must tine his action, conform to the 219 act of Parliament in 1594, declaring that whatsoever pursuer

should slay, wound, or otherwise invade the defender during the time of the dependence of their action, should tine his cause, without any other probation save of the riot, and this whether he did it himself or others by his red or counsel; but *ita est*, this pursuer had suborned persons to beat and hurt him, who had accordingly executed the orders given them. It was ANSWERED he behoved to say his blood was shed.

The Lords found he needed not, because the act is conceived *alternativè*, if he either wound to the effusion of blood, or they invade one another in any sort whereon they could be criminally accused.

2do, ANSWERED, the subordination and mandate was only probable by the pursuer's oath and not by witnesses. REPLIED, though in *civilibus* a mandate was only probable *scripto vel juramento*, yet they having replied that he was art and part, and that it was done *ejus ope et consilio*; as probation by witnesses of this would be admitted in a criminal pursuit before the Justices, and would import conviction, so the same probation may be used here. *Vide supra, No.* 162, [*Lord Advocate* against *Robertsones*, 9*th March* 1671.]

They were to have the Lords' answer, whether his order could be proven otherwise than by his own oath. See this case fully in the informations.

Advocates' MS. No. 295, *folio* 123.

1672. *January* 16. MR. WILLIAM BEATON, Advocate, *against* SCOT.

IT was about this time controverted whether or not a base infeftment, clad with possession for years or terms before the rebellion of the granter, will exclude the donatar to his escheat. It seemed to many as *juris indubitati* that it would; yet the Lords demurred thereon, and ordained practiques to be adduced *hinc inde*; (because, forsooth, my Lord Stair in his book prefers the donatar very dogmatically and magisterially.) And it makes me call to mind *John Scot's* case against one *Hog*, on the 15*th of January* 1666, wherein the Lords found a base infeftment of warrandice not clad with possession save what he had of the principal lands, preferable to a posterior public infeftment in the same warrandice lands, clad with thirty or forty years possession.

Advocates' MS. No. 292, § 2. *folio* 123.

1672. *January* 16.—In the competition *supra* at *No.* 292, betwixt a base infeftment clad with possession before the denunciation, and the donatar to the said superior, granter of the infeftment, his escheat: the Lords at last found the base infeftment preferable, and that in respect of a practique following on a full debate in the time of the English.

This was well decided, in my judgment, else where a nobleman or gentleman having vassals holding of him, unconfirmed by the immediate superior, went to the horn, and his liferent is gifted, the mails and duties of the whole vassals' lands, though alienated, if they be not confirmed, should belong to the donatar. See the informations of this beside me. *Vide infra, No.* 413, [*Tenants of Bathgate* against *Crawfurd, July* 1673.] *Vide* Dury, 19*th March*

1683. *Renton cont. Blacader. Vide* Hadinton, *at the 9th of December* 1609, *Spotswood* and *the L. of Westforton.*

Advocates' MS. No. 297, *folio* 123.

1671 and 1672. The EARL of SUTHERLAND *against* The EARLS of ERROLL and MARSHELL.

1671. *July* 7.—THERE is a declarator raised at the instance of the Earl of Sutherland against the Earls of Erroll and Marshell, for declaring that the precedency both in Parliament, Council, and other places, belongs to him; together with an improbation of all such writs as any way may instruct their antiquity beyond his, &c.

Advocates' MS. No. 206, *folio* 103.

November 24. — The haill terms of the improbation mentioned *supra* at *No.* 206, at Sutherland's instance against Erroll and Marshell, for the precedency, being run, certification was this day granted against all patents of honour, or other writs whatsoever, granted to the said Earls, which can any ways instruct their precedency, because they were not produced; but for any other writs that could adminicle the same or collaterally speak of the said Earls, belonging to other persons, refuses certification against these. But thought the said Earls *qua* Constable and *qua* Marshell to have the place, at least will not dispute thereon, because Sutherland's summons is not against them *qua tales* but only as Earls: so that this contest was only for the Ladies their place; for the Constabulary and Marischalate being personal dignities, their Ladies take no place thereby; but the Countess of Sutherland (if he be an older Earl) will take the place of them. It was judged a new practique to admit certification against patents; which are in public custody, and that the surest and most noble of all others, *viz.* the records of Parliament.

Advocates' MS. No. 271, *folio* 115.

1672. *January* 16.—My Lord Erroll's procurators having stopped the certification granted *supra* at *No.* 271, against all patents of honour, or other writs granted immediately and directly to himself and his predecessors, Earls of Erroll, in so far as they could instruct precedency before Sutherland; and they being of new heard upon that point, it was ALLEGED for Erroll, that no certification could be admitted, because patents of honour were not the subject matter of improbations nor certifications, unless the pursuer laid claim to the defender's title of honour, whereby he and his predecessors are created or designed Earls of Erroll, which is not the case. And in an improbation the defender's and pursuer's rights and interests must be *in eodem subjecto*, which is not here; the pursuer's title of honour and the defender's being things quite different, and which may both subsist as *res mere disparatæ*. And in an improbation the pursuer and defender must both be pretenders to dominion in the thing concerning which improbation is moved; as for instance, in improbation of rights of lands the pursuer must libel he stands infeft in these lands, and the defender's rights called for must be rights of in-

feftment, or such rights as may affect the lands wherein the pursuer libels he stands infeft, else his title will not be sustained, nor any certification granted; and the only proper way to pursue precedency is by a declarator.

REPLIED, though the pursuer and defenders' title were different things, yet he had good interest to pursue this improbation, because precedency which consequently arose from their patents, was the subject matter of the debate.

See the answers to this and the other replies in the information.

The Lords *(totis viribus obnitente præside)* found such writs as patents and the like were not the subject matter of a certification, because the pursuer's and defenders' rights were not *circa idem*. And my Lord Advocate reasoned against the pursuer's consequential interest, that if it were enough to sustain the admitting a certification, then, by the same rule, a man only served heir to his father might crave improbation or certification against writs granted by his goodsire or others, though he is not served heir to them, there being a good consequential interest. *2do*, A man infeft in a mill might upon that ground crave certification against the evidents of another mill near him, by which he finds himself hugely grieved and prejudged in the thirl or sucken of his mill. *3tio*, One man having a fair might by this account improve the writs of another heritor's fair, whereby he finds his customs diminished; and yet all thir are absurd.

Advocates' MS. No. 298, *folio* 124.

1672. *January* 16.

A WOMAN in Aberdeen being at the point of death dispones some tenements of land and other heritage to . She, recovering of her sickness, raises reduction of the said disposition upon thir heads; as being *omnium bonorum, sine omni causa onerosa* done *in lecto ægritudinis;* and so as it might have been questioned by her heir, *multo magis* may it be done by herself, since the heir can have no greater power than the defunct had; that at most it was *donatio mortis causa*, which being in case of death, that not existing the donation falls; *magis enim vult se habere quam eum cui donat, et magis eum cui donat quam hæredem suum;* that it was *donatio inofficiosa*, the questioning whereof, though it was competent only to the children and other nearest of kin to the donatar, and that not for the whole, but only *in quantum* it was immoderate, and absorbed their legitim portions, yet *a fortiori* it seems most proper to the parties' self to reduce their gift to a mediocrity; that the *donatarii* were ungrate, in so far as they refused to repone her to her own place upon her reconvalescence; and so of the common law she might annul and revoke her gift, &c.

To all which it was ANSWERED, That this action was a novelty in our law; that this age, as barren of all charity and gratuitous deeds, knows no donations, and therefore allowed no revocation of deeds once consummated; that it was not *in lecto*, since she did not die of that sickness; though the heir will be reponed against a deed done by his predecessor *in lecto*, yet it was never so much as attempted by the party's self; that she could not pretend to the benefit of minority

a paritate rationis, seeing *privilegia* are *stricta juris* and cannot be extended *de casu in casum, &c.*

This was reasoned. But how far a donation may be revoked by the granter either *ob ingratitudinem, injurias ei a donatario factas, supervenientiam liberorum,* or the like, (for unless the granter do it his heirs could not do it,) by our law I cannot determine: nor yet if *quærela inofficiosa* would with us be sustained if intended against a donation by children, or the nearest of kin, in so far as it defrauds them of their legitim or agnate's part.

Advocates' MS. No. 300, *folio* 124.

1672. *January* 16. Anent REDEEMABLE RIGHTS of LAND.

IT was questioned, a man having a wadset or hypothecation in lands redeemable upon such a sum, or a disposition of lands for relief of such particular cautionaries wherein he stands engaged for the disponer, as are therein named, without this clause, "and for relief of all other cautionaries wherein he either presently or thereafter happens to be bound for him," if other sums be owing him beside the sum contained in the wadset, or if he has paid other sums as cautioner, forby those enumerated in the bond of relief; whether he may be forced to renounce his wadset and disposition for relief, upon payment only of the sums in the wadset and the cautionaries mentioned in the bond of relief, or if *licet rem detinere et incumbere pignori* till the other personal debts for which he has no such real security be paid him. I imagine he could not detain the land with us, if the sums in his wadset or bond for relief were offered. But the Roman law makes a very rational distinction in this case, *qui debet pecuniam sub pignore, aliam vero summam eidem sine pignore nudo quippe chirographo,* the debtor cannot outloose the land or pledge, unless he pay both the sums; but this will not strike against another creditor of the debtor, or one who shall acquire his right *ex titulo singulari. Vide titulum C. Etiam ob chirographariam pecuniam pignus retineri posse. Vide supra, No.* 333, *Maisson* against *Rhind, January* 1672.

Advocates' MS. No. 301, *folio* 124.

1672. *January* 16. Anent QUADRIENNIUM UTILE.

IT was questioned whether a man revoking a deed done by him in his minority *intra quadriennium utile,* must also raise his reduction of that deed, and end it before the elapsing of the said space, or if he may reduce these deeds at any time thereafter, if so be they were revoked within the twenty-fifth year? By our law, it seems that at least the reduction should be raised and called before the expiring of the said profitable years, but that it may be insisted on after: so Dury, *2d February* 1630, *Hamilton* against *Sharp and others,* who cites *l. ult. C. Si major factus alienationem, &c.* for it. That a revocation should precede the

reduction, seems not of absolute necessity, seeing the reduction raised within the years sufficiently declares their intention. *Vide* Dury, 16*th November* 1630, *Murray* against *Cochrane*; 8*th July* 1642, *Inglish* against *Aitkit, in fine.*

Quæritur farther, a man dies before twenty-five without revoking some prejudicial deeds done by him in his minority, if his heir or any other who succeeds in his right may revoke these deeds done by his predecessor. Though restitution *in integrum ex capite minoritatis* seems to be *beneficium personale*, and so not competent to the heir where neglected by the minor then become major, though within the years allowed for revocation; yet our law following the road of the common law in *l. 5. C. de temporibus in integrum restitutionum*, if the heir who succeeds be major, it allows him what years remained of the *quadriennium utile* to his author, within which he may revoke and quarrel his deeds; and if the heir be minor, he not only has all the years of his own minority, but also the residue of that profitable time which remained to his predecessor. They found lately a revocation made *intra quadriennium utile* restores not, unless a reduction be also raised within that space, between Sir James Ramsay of Whythill and Maxwell. *Vide infra No.* 313, [1*st February* 1672.]

It deserves consideration, how far a minor's asserting himself to be major at the time he grants writs, will elide and remove him *exceptione doli mali* from craving restitution against these writs as done by him in his less age: and what it would operate, if he offer him to prove that the creditor knew him (at least as having been his tutor or relation should have known him) to be minor at that time, notwithstanding of his assertion, seeing he was not *deceptus*; at least *uterque erat in dolo. Vide Tit. C. Si minor se majorem dixerit. See* Dury *ult. February* 1637, *Weimes of Latheker. Vide infra, No.* 328, [13*th February* 1672.]

Advocates' MS. No. 302, *folio* 125.

1672. *January* 20. LORD DRUMLANRICK *against* HIS VASSALS.

IN the improbation pursued at my Lord Drumlanrick's instance against his vassals, it was ALLEGED for one, That no certification could be granted against his writs, because he offered him to prove he had been in possession peaceably of the controverted lands by the space of forty years, and that by virtue of a right, and so has prescribed against this pursuer. ANSWERED, That forty years prescription, nor no other defence consisting *in facto*, and so cannot be instantly verified, can be obtruded to obstruct certification.

The Lords *in presentia* admitted certification, reserving to the defender to reduce upon the prescription.

Advocates' MS. No. 305, *folio* 126.

1672. *January* 20.

A certain woman pursuing the heir of the granter, for payment of a sum contained in a bond, it was ALLEGED, She could not seek implement of the bond, because it was *sub hac conditione, si ejus consensum in nuptiis adhibuerit*, which she did not. To this it was ANSWERED, That *matrimonia debent esse libera*, that clauses restricting the liberty of marriage are reprobated as unhonest, that *habentur pro nullis seu non adjectis*, and notwithstanding thereof the thing is due; that though she has not married with his consent, yet she has not married *personæ turpi* but honourably *et sine desparagio*, which must be reputed an implement of the condition *per æquipollens*. REPLIED, Clauses prohibiting marriage *simpliciter* are rejected, but not such as circumscribe it within such and such bounds; that such conditions cannot be fulfilled otherways than *in forma specifica*; that Craig allows of such conditions, *page* 161. *ibique ll. ac Doctores citati.*

They were to have the Lords' answer, whether or no she could acclaim any benefit by the bond whereof she had forefaulted the express condition. *L.* 134, *in principio, D. de V. obligationibus, L.* 2. *C. de inutilibus stipulationibus. Vide infra, No.* 394, *capit.* 20. *extra, de sponsalibus. Vide* Dury, 16*th December* 1629, *Home* against *Tenants. Perezius ad tit. C. de donationibus quæ sub modo, &c. Num.* 4. *Advocates' MS. No.* 306, *folio* 126.

1672. *January.* ROBERT PITILLO *against* ———.

I CALL to mind that in the month of July 1671, the Lords found, in a case of Mr. Robert Pitillo's, that the cedent's oath might be taken in prejudice of the assignee, where it was confessed that the assignation was without onerous causes; though before, it was counted a brocard, that the cedent could not swear in prejudice of the assignee, unless the assignee first had confessed the assignation to have been to the cedent's behoof.

Advocates' MS. No. 307, § 1, *folio* 126.

1672. *January.* LORD HALTON *against* The LAIRD OF AYTON.

IN a case betwixt my Lord Halton and the Laird of Ayton about a comprising of Glastry, (bought in by Argyle,) which was founded on a gift of escheat given in 1664 to Andrew Patersone, without any back-bond to be countable, the Lords restricted the gift, and consequently the comprising, to Patersone's true debt, as if he had given back-bond, because, by an act of Exchequer, no gifts should be given without back-bonds. Upon which his just debt was found more than paid by his intromission, and so the comprising fell in consequence. *Vide infra, No.* 382, [*December* 1672, *Stuart* against *Stuart's heirs.*]

Advocates' MS. No. 307, § 2, *folio* 126.

1672. *January.* KINGENNY *against* MARGARET SCRYMGEOUR.

THAT tutors nominated, and for a time not accepting, are only accountable from the time of their acceptance, for omissions and commissions, and not from the date of the nomination, and that the pursuing for exhibition of the minor's writs was an acceptation and behaviour as tutor. This was found betwixt Kingenny and Margaret Scrymgeour. *Vide* Balfour, *titulo* Of Reduction of Sentences.

Advocates' MS. No. 307, § 3, *folio* 126.

1672. *January.* LADY MILNETONE *against* The LAIRD.

IN the Lady Milnetone's case with the Laird, the Lords found that bribing and corrupting of witnesses may be objected *in secunda instantia*, and that the same being proven, the sentence of divorce which proceeded upon the depositions of these witnesses would reduce. Then the great question was, how the bribing was probable; for it seemed dangerous to refer to the lady's oath that she had bribed them, the import of that being criminal: and to prove it by witnesses would prove an endless vexation; seeing a reprobator of their testimony might be raised, as if they had been bribed to depone that the former witnesses were bribed, which second bribery, if it were probable by witnesses, ye might so go on *in infinitum*. The Lords found the lady should give her oath on it. Who deponed *negative*; whereon she was assoilyied from the reprobator. Sir G. Mackeinzie's pleading says, they found it probable *per testes omni exceptione majores*. *Vide supra*, thir same parties, 24*th February* 1668, page 439.

Advocates' MS. No. 307, § 4, *folio* 126.

1672. *January.*

IT came to be debated who was fiar in this conception. A sum is provided to a man and his wife and to the heirs of the marriage, which failyieing to the wife's heir. The termination on the wife's heir makes the doubt: yet the Lords found the man fiar, it being a donation flowing from him, and that he might have uplifted the sum in his lifetime and discharged it. *See* Hadinton, 10*th November* 1609, *Bartill Tullo* against *Laird of Carberry*,

Advocates' MS. No. 307, § 5, *folio* 126.

SIR JOHN KEITH *against* ———.

AN inhibition being sought to be reduced upon this single head, that though it bore the party inhibited to have been personally apprehended, yet it wanted

that a copy was delivered to him; the Lords annulled the inhibition for this want, although they offered them to prove, in fortification of the messenger's execution, that a copy was truly delivered to him. This was between Sir John Keith and ——.

Advocates' MS. No. 307, §.6, *folio* 126.

1672. *January* 20. —— *against* SIR ANDREW and LADY DICK.

SIR ANDREW DICK's lady and himself being pursued upon a bond granted by her, it was ALLEGED to be null, because given by a wife clad with a husband, without his consent. ANSWERED, 1*mo*, She was *præposita negotiis*, and the subject matter of the bond was what fell under her præposition, viz. for meat and drink furnished; and so being *ob alimenta familiæ præstita*, it was *in rem mariti versum*; and that it was for the price of victual, refers to her oath. REPLIED, The wife can depone nothing in prejudice of her husband.

Yet the Lords found in this case, the wife ought to depone; and she confessing that to have been the cause of the bond, they would sustain it. Yet see Hadington, 23*d June* 1613, *Clement Russell* against *the Earl of Argile*, which seems somewhat contrary.

Advocates' MS. No. 308, *folio* 126.

1672. *January* 24. MR. JOHN ANDERSONE *against* JOHN WATSONE.

I WAS this day informed of an action pursued in 1664, by Mr. John Andersone, parson of Dysart, against John Watsone, heritor of the Pathhead, as he who had the only Kirklands in the parish, for a glebe. Wherein it was ALLEGED, 1*mo*, That being a minister of a burgh royal, he could have no glebe.

ANSWERED,—That all ministers, though of burghs royal, had right to a glebe, providing they had any land-ward parish belonging to them, as he had; and that the 20th act of Parliament in 1663, does not exclude all ministers of royal burghs from a glebe, but only some.

The Lords found he had right to a glebe, because he had likewise the cure of a country parish.

2*do*, They ALLEGED, that the parson of Dysart could seek no glebe, because of old they had a glebe designed to them, viz. That part of the town of Dysart which is called the rectory, which at that time was in acres,* and was by the parsons since feued out at sundry times to several persons who have built houses thereupon, and pay a small feu-duty of two pence or three pence to the parson as superior and rector of the said rectory; who likewise enters the heirs and singular successors in these tenements for a composition; and if the parsons have

* Which acres at least were parson's land, and, by the act of Parliament they must be designed before other kirklands.

prejudged themselves of their glebe in the manner condescended on *sibi imputent.**

To this it was ANSWERED,—That the said rectory will not be the third part of the town; that the haill feu-duties paid him will scarce make a dollar a year; that this ground was feued out long before the acts of Parliament appointing ministers to have glebes, and so cannot be reputed his glebe.

Yet the Lords construed it "instead of his glebe;" only they did him this favour, that the haill ground whereon these houses were built should be met, and if it wanted any thing to make it a complete glebe, conform to the quantity designed by the acts of Parliament, that then the same should be made up out of the Pathhead, because the defender could condescend upon no other parson's lands, save these of this rectory. Whereon they transacted the matter; and for the overplus, Watsone obliged himself to pay the parson, yearly, a sum of money during his incumbency there. See this decision, *Tit.* 9, *voce Gleibs*, in an 8vo. MS. of Pratiques.

Advocates' MS. No. 309, *folio* 126.

1672. *January* 24.

A PUPIL being pursued either as lawfully charged to enter heir or to renounce lands because of an order of redemption used, and compearing, and producing a renunciation subscribed by his tutor, taking burden for the pupil; the Lords sustained the same as a good and sufficient renunciation;

Albeit it was ALLEGED,—That it ought to be subscribed by the pupil's self, principally, and also by his tutors. Which was repelled, because *in ætate pupillari tutor gerit personam pupilli;* and he may be an infant that cannot write; yea few can write any till they be ten or twelve. What if the child be a lass, who if of the minor sort, are seldom taught to write at all? It is granted, after tutory expires, the minor begins and acts principally himself in all deeds, and his curators do but consent; *at res aliter se habet in tutela ubi datur personæ non rebus; intellige principaliter. Vide infra, No.* 411, [*July*, 1673.].

Advocates' MS. No. 310, *folio* 127.

1672. *January* 25.

A SUSPENSION having been quarrelled as passed, contrary to the regulations, in so far as by the nineteenth article thereof, it is ordained, that no decreet *in foro* be suspended if in the time of Session, till the bill be presented to the haill Lords; if in the vacance time, then it must be passed by three together; and that this suspension, though a decreet *in foro*, was passed only by one, viz. my Lord Newbyth, and so was null.

* Yet see act 27, Parliament 1563, prohibiting glebes to be set in feu or in tacks.

This being taken to interlocutor, the Lords found the letters orderly proceeded, without respect to the suspension, unless the party would yet find sufficient caution, if he succumb in the suspension. It was a little rub on the Lord, but much more on the clerk to the Bills. It were much to be wished that a subsidiary action were tried against the clerks of that chamber, for receiving so many irresponsal cautioners as they do, especially where the insufficiency is intimated to them. Yet I confess, if that were brought in practice it might make that place very dangerous, yea a snare, and might draw more burden on Sir William Bruce than he is worth, since it is impossible for him to know the condition and solvency of all the lieges in Scotland; and it is enough they have a designation by land, and, in vulgar estimate, are reputed worth the sum charged for at that time when they are received. *Vide* more of this *alibi; item*, No. 489, [Historical Volume,] *July* 1676, *Earl of Argyle and Maccleans.*

Advocates' MS. No. 311, *folio* 127.

1672. *February* 1. SIR JAMES RAMSAY of Whythill *against* MAXWELL of Garnsalloch.

IN the action [mentioned in page 612,] between Sir James Ramsay and Maxwell of Garnsalloch, at number 302; the Lords found an act of curatory null, because three was declared to be a quorum, and three never accepted, and so their not acceptation (though the rest acted as curators) made the whole curatory to fall. But I suppose it will not be so in a tutory, where some, yea the major part, renouncing, the office accresces unto the rest, though the fewer: at least there will be more doubt in it. See Hadington, *December* 12, 1609, *Fairsyde* and *Adamsone.*

Advocates' MS. No. 313, *folio* 127.

1672. *January* 10, and *February* 1. LADY MACCARSTON and CAPTAIN GUTHRY, her Husband, *against* The LAIRD of MACCARSTON, her Son.

January 10.—A MOTHER having alimented her children, which she was not otherwise bound to do; *quæritur*, if she will get repetition thereof? It seems she will not, if she be yet a widow, *quia præsumitur inter ascendentes et descendentes præstitum ex pietate*, and so *cessat repetitio;* but the presumption fails *si præstita sint postquam super induxit vitricum vel si protestata fuerat. Vide omnino Nesennius, 34 D. de negotiis gestis.*

Advocates' MS. No. 296, *folio* 123.

February 1, 1672. In the action noted *supra* at number 296, betwixt Captain Guthry, who had married the Lady Maccarston, and the Laird of Maccarston, her son; the Lords found that a woman, having alimented her children come to

years, (though she was at the time clad with a husband,) and made no conditions with them, could have no repetition, because there the presumption of donation takes place; but if they were infants who were not capable of pactioning and entering into terms, then the mother's alimenting them, and not declaring *quo animo* she did it, prejudges her not, but she may thereafter crave the same. I think it ought also to be considered, if the children had *aliunde* sufficient means whereon they might have been alimented according to their rank and quality; in which case, I think the presumption *quod mater vellet donare* is weak; but if she liferent the whole, or the greatest part, then the presumption is pregnant against repetition.

See this and other two points in the informations beside me. *Vide infra February* 1676, No. 471, § 3, [*Viscountess of Oxenfuird* against *her Son.*] See *February* 18, 1679, *Sibbald of Kair.*

Advocates' MS. No. 314, *folio* 127.

1672. *February* 1. DAME ANNA FOULLS *against* The CHILDREN of PRESIDENT GILMOUR.

IN the action pursued by Dame Anna Foulls against the children of President Gilmour, the Lords inclined to find there ought to be a representation in moveables, on the same very reasons that it has been hitherto received in heritage; so that if one die leaving two brothers or two sisters behind him on life, and one of them die before confirmation, his or her children *jure representationis et stirpis* will come in and carry away the equal half of the executory from the brother or sister still on life: but if, at the time of his decease, he leave only one brother on life, and nephews by another who predeceased, the question will be greater, whether then the brother's children will come in *pari passu* with their uncle, to the executory. But for the first case, they say it was already determined in 1663 or 1664, between Bells and . Sure I am, before that time it was a novelty and heresy in our law, and contrary to its most uncontroverted principles.

Advocates' MS. No. 315, *folio* 127.

1672. *February* 2. Anent PROTECTIONS.

IT was questioned this day amongst the advocates, if a protection could defend one from a caption taken out against him upon a decreet for exhibition of writs. It seemed to be out of question that it would not, seeing a protection defended his person against civil debts, but not from such deeds as these.

It was also doubted whether a man at the horn, who has not *personam standi in judicio*, obtaining a protection, so redintegrates his state that he may pursue or defend. And it was thought it did not, because protections being odious should

not be enlarged; and a horning has all its civil effects, notwithstanding of a protection, save only caption; so that annualrent will be due thereon, his escheat may be gifted, and so of all the rest.

Advocates' MS. No. 316, *folio* 127.

1672. *February* 6. Mr. JOHN BAYNE of Pitcarly *against* Mr. GEORGE SCOT of Pittedy.

THE Lords having advised the debate betwixt Mr. John Bayne of Pitcarly and Mr. George Scot of Pittedy, with the depositary, Mr. Robert Reull, his oath, they found the minute obligatory, and ordained the same to be given up by Reull to Pitcarly; notwithstanding it was alleged that the same was not a delivered evident, but only consigned till next meeting, at which time sundry things controverted betwixt them were to be communed on; so that it being an unconsummated bargain, there was *locus pœnitentiæ*, likeas he did resile *debito tempore*; see Balmanno's practiques *verbo* Penalties, page 224, *et seq.*; as also, he offered to pay the penalty to be freed of the bargain, which penalty was 4000 merks; which the Lords repelled, as being over and above the performance. See it so decided on the 5th of *March*, 1684, *Murray* against *Lord Blantyre*; *March* 19, 1630, *Crichton*. But in regard, it was controverted betwixt them, whether Pitcarly should take, in part of the price, a bond of 20,000 merks, granted to Mr. George, by William Calderwood, who acquired the lands of Pittedy, seeing the same was clogged and affected with sundry conditions, and expressly that William Calderwood should retain it ay and while the lands of Pittedy were disburdened of the incumbrances condescended on, which are not yet purged; the Lords recommended to two of their number to consider how the said bond might be made effectual to Pitcarly, so that he might accept it in part of the price of his lands. See the information of it beside me.

Advocates' MS. No. 317, *folio* 128.

1672. *February.* SIR GEORGE GORDON of Haddow *against* The LAIRD of COCKBURNE.

ABOUT the beginning of this month was the debate betwixt Sir George Gordon of Haddow and the Laird of Cockburne, wherein the case was as follows; Bailie Mercer being debtor to Haddow in the sum of 3000 merks, and Cockburne being bound for Mercer in sundry considerable cautionaries, he obtains for his relief an assignation to a bond of 4000 merks, amongst many other bonds due by the Laird of Cragievar to Bailie Mercer. Haddow hearing the Bailie was breaking, and had disposed on the most part of his estate, and particularly on that bond, he causes draw an assignation of Bailie Mercer's bond of 3000 merks to him in favours of Cragievar, Mercer's debtor, and delivers the same to Mr.

David Thoirs, as treater and communer for and in name and behalf of Cragievar, who accordingly accepts thereof; and this assignation made to Craigievar *is* intimated to Mercer, the debtor in that bond, I think a day before Cockburne could get his assignation intimated to Cragievar. This being the matter of fact; when Cockburne pursues for his sum, Cragievar ALLEGES he must have compensation, in so far as he was become creditor to Mercer, by Sir George Gordon's assignation to him, before Cockburne's intimation; and so being both debtor and creditor *vicissim, confusione tollitur obligatio.*

To this it was ANSWERED,—That they could not be heard to plead compensation on that head unless they would say that Cragievar knew of this assignation made to him by Haddow, and accepted of the same before Cockburne intimated his assignation, seeing it was only a northland, done of collusion and set purpose, to elude Cockburne's assignation; *et non amo nimium diligentes;* it was done without any onerous cause on Cragievar's part, and Haddow laid so small weight on this conveyance, that at the same time he, in his own name, and for payment of his debt, caused arrest the sum due by Cragievar, which by the course of nature was inconsistent and incompatible with his former assignation, whereby he was denuded of the right to that sum.

REPLIED,—That they needed not say that Cragievar knew of that assignation or accepted thereof before Cockburne's intimation, because of the law, *Si procurator rem mihi emerit ex mandato meo, eique sit tradita meo nomine, dominium mihi, id est, proprietas acquiritur etiam ignoranti; l.* 13 *D. de acquir. rerum dominio; l.* 34 *p.* 1, *D. de acquir. vel amitt. possess. par.* 5 *Instit. per quas personas cuique acquiritur;* so that all the law required was, that he give a commission for doing such a business or acquiring such a thing; which the mandatary accordingly acting, *mandanti ignoranti res illa acquiritur. Vide* Dumnum, *in commentario ad regulam* 3 *Juris Canonici;* Perezium *ad Tit. C. de donation. quæ sub modo et condit. numero* 8*vo.*

The Lords *referente Domino Craigie,* ordained Cragievar the alleged *mandator,* and Mr. David Thoirs the alleged *mandatarius,* to be examined before answer, whether Cragievar gave any commission to Mr. David Thoirs to treat with Haddow for that bond of Mercer's, and if Mr. Thoirs accepted the assignation in Cragievar's name, and for him intimated it to Bailie Mercer. Which if they grant, then I imagine the Lords will sustain the assignation made to Cragievar, though he was ignorant of it, because it was accepted by Mr. David Thoirs, who had a commission from him to that effect.

Advocates' MS. No. 320, *folio* 128.

1672. *February* 9. The LAIRD of BALNAMOON *against* JOHN MACINTOSH.

THIS Macintosh having married his daughter on one Weymes, by the contract of marriage he is obliged to pay 2000 merks in name of tocher, to which 2000 merks Weymes is obliged to lay 3000 merks of his own monies; and which 5000 merks is provided to him and her and the longest liver of them two, in conjunct fee, and to the heirs of the marriage to be procreated betwixt them. Weymes being

debtor to Carnegy of Balnamoon, and having no other way to pay him, he assigns him to that obligement in the contract of marriage, whereby Macintosh, his goodfather, is obliged to pay him 2000 merks; Balnamoon, charging for the sum, Macintosh suspends on this reason, that he was not liable to pay it *simpliciter*, but to pay it under this quality, that it should be employed first for the use of his daughter, and then for the children of the marriage; in respect of which destination he cannot pay it to this assignee.

To which it was ANSWERED,—That the charge at the assignee's instance, must be found orderly proceeded, notwithstanding of the reason; because any destination of the tocher contained in the contract of marriage, takes not away the husband's dominion therein, in so far as the wife is dead, and so her liferent thereof can never exist; and for the children they can lay no claim in it, because it is provided to the heirs of the marriage, and how long the father lives they cannot be heirs.

REPLIED,—By heirs must be understood bairns.

DUPLIED,—However heirs might be interpreted bairns in a man's second contract of marriage, yet it can never but be properly taken for heirs served and retoured in the first, as this was. *Item*, The father is doubtless fiar of the sum; and so may dispose and assign it at his pleasure, because the termination of the fee is on his heirs.

The Lords found the letters orderly proceeded, reserving action to Macintosh against the charger's cedent, to see the contract of marriage fulfilled to his grandchildren. This seems pretty hard, and is direct contrary to that decision in Dury, at the *20th November*, 1623, *Goodman of Kinblathmont*. *Vide infra November* 1677, *Barbara Grant* against *Janet Cuthbert*, No. 647, § 4.

It were to be wished that some of the Lords' number, and the lawyers, did meet, and take to their consideration the import of all the clauses used in contracts of marriage, by explaining the ambiguity of the said clauses, and by setting down a certain rule whereby they may be equally and alike understood in all time coming. *Vide infra*, No. 351, [*Lundy* against *Lundy*, *26th June*, 1672] *in fine*; and 396, [*June*, 1673;] and 430, [*Lauder* against *Alisone*, *November* 1673.

Advocates' MS. No. 321, *folio* 129.

1672. *February* 9. Anent The TOWN OF EDINBURGH'S CHARTER in 1636.

ABOUT this time I had occasion to see the town of Edinburgh their great charter, granted to them by King Charles in 1636, with the seasine taken thereon in 1637. It is a new gift to the town of their burgh, mills, common moor, port and harbour of Leith and Newhaven, superiority of Leith, dock-money, anchorage-money, golden pennies, &c.; office of sheriff-ship and justiciary of peace, within their town and liberties, &c. with a ratification of all their former infeftments. As for the badges of honour and sovereignty (so to speak) conferred on the Provost and other Magistrates of the city, *viz.* the sword, sceptre, and red robes, these are by the grant of King James the VI. by his charter under the great seal in 1621, and that on the parallel of the Lord Mayor of London.

Many persons are of the opinion that this last charter in 1636, has done the town much more hurt than good, because it has either cut them off expressly from sundry privileges comprehended in their ancient infeftments, or prejudged them thereof, in so far as they are altogether omitted in this. I shall instance only one. Craig in *Dieg. de Regalibus*, page 117, tells, that the town of Edinburgh, by a special privilege, are indulged the escheat of all condemned within their burgh and liberties for slaughter; and *idem*, page 121, tells they have the power of having and retaining their own fisk; yet by the charter, 1636, the escheats of all persons condemned within the town are specially reserved to the king, and the town for ever secluded therefrom.

It was sore against the town's heart and will that they altered their former charter, but they were forced to it. See more of the town of Edinburgh's charter, *alibi*. (*Vide* Balfour's practiques. *Tit. of Burrows*, cap. 20.) From the council books of the town of Edinburgh in 1629, &c. I find they had procured a charter in 1603, with many strange clauses and privileges; *videlicet*, right of regality, admiralty, right of the north castlebank, as well as the south; and very prejudicial to the gentlemen of West Lothian; which they were * * * * * * *

Advocates' MS. No. 322, folio 129.

1672. *February* 9. The Procurator Fiscal of Air *against* ——.

The Sheriff-clerk of the Sheriffdom of Air being indebted to a gentlewoman, liferentrix of some lands within the said Sheriffdom, the sum of L.40 Sterling; that he may get an apparent ground of compensation, (for the act gives the fines of all within heritors to the respective courts, who shall see to the execution of the acts;) he causes the Procurator-fiscal pursue her before the Sheriff court, upon the 7th act of Parliament, made in anno 1670 for tinsel of the eighth part of her liferent; and that for her withdrawing and absenting herself from her parish church, by the space of three Sabbath days together, for several times, so that an eighth was *toties quoties* due; and in absence, procures a decreet against her. This decreet was suspended on thir two reasons, 1*mo*, That the act means only for wilful staying away, and not of every withdrawing; and so the decreet was null, in so far as it was not proven therein that her separation was through non-conformity: likeas, she offered her to prove *causam maxime sonticam absentiæ, videlicet* sickness. 2*do*, Though the act 1670, requires no more for incurring the fines thereby imposed, but only unnecessary absence for the space of the three Lord's days together; yet the first act in 1663 (which must regulate the act 1670, and interpret it in so far as it is silent or doth not abrogate it *per expressum*,) requires (and that most rationally) that before any one be stated as guilty of that act, they must first be admonished by the minister, in presence of two sufficient witnesses, and that must be so attested by him: now *ita est*, this method (which seems to be Christ's own, first admonish thy brother in secret; if that prevail not, then before the elders; if he still remain obstinate, then *dic ecclesiæ*;) was not used with her: *ergo*, &c.

The charge, in my weak judgement, ought to be suspended *simpliciter*.

Advocates' MS. No. 323, folio 129.

1672. *February* 9. Minister of ——— *against* His PARISHIONERS.

A MINISTER pursuing upon his decreet of locality, for payment of L.20, modified yearly therein for the communion elements; the parishioners EXCEPTED that he could have nothing upon that account, because they never got the sacrament from him. To which it was REPLIED, it was not his fault that they got it not, but their own; he intimated the same to them, and none came to declare their willingness to receive it, and so *per ipsos stetit; in omnibus causis pro facto accipitur id, in quo per alium moræ sit, quominus fiat, L.* 39, *L.* 161 *D. de R. Juris.*

To this it was DUPLIED,—That he was in *pessima fide* to intimate to them that he would administrate it, seeing none of them were examined; which being necessarily previous, they were not in a capacity to receive the holy sacrament without it.

TRIPLIED,—That the duply is founded *super propria turpitudine*, seeing they were warned to the examinations, and most contumaciously and irreligiously were absent, and so *quod pœnam meretur non potest iis liberationem impertire.*

Advocates' MS. No. 324, *folio* 129.

1672. *February* 9. Anent ESCHEAT of CLERKSHIPS.

IT was doubted amongst the advocates, if an office of clerkship, (whether of a town, sheriff, commissary, or the like, *non refert,*) falls by the clerk's annual rebellion under his liferent escheat; and the same being gifted, whether, the rebel still officiating, only the obventions and profits of the place will belong to the donatar, or if the donatar becomes clerk himself for all the days of the rebel's lifetime, and so may act accordingly; or if the office vaiks in the hands of those who have the disposal of it, whether it be the King or any other, so that they may input another clerk. The casualties resulting from the office will undoubtedly fall under escheat. See Hope *in practicis observationibus patris* upon the title anent Hornings and Escheats, *folio* 197, in the action betwixt Mr. Henry Kinrois and James Drummond. *Sed omnino vide* Craig, page 332; Spotswood *Tit. comprisings.*

I find by the town-council books of Edinburgh, in the year 1565, Mr. Alexander Guthry his clerkship, as fallen under escheat, disponed to Mr. D. Chalmers, a Lord of the Session, who charged the town-counsel with horning to receive him clerk; the Dean of Guild protested the place fell not, but only the casualty; yet for fear of horning they choosed him clerk, the Laird of Craigmiller, who was Provost, dissenting. See *Joannis Imberti Institutiones Gallorum Forenses, libro primo, capite* 59.

Advocates' MS. No. 325, *folio* 130.

1672. *February* 9. Anent HEIRS PORTIONERS.

IT was likewise questioned at this time, whether women being heirs portioners will be liable, each of them *in solidum*, for their predecessor's debt, or if they can be convened only each for their own parts, so that the debt will divide amongst them all. It is uncontroverted but the creditor must call them all; so that if there be two or more, he will not get one of them decerned to pay the whole, unless he has also summoned the rest. [It is otherways amongst more executors. Each will be decerned *in solidum*, if so be, I can prove that each of them has intromitted with as much as the sum acclaimed by me comes to. So Dury, *July* 13, 1625, *M'Mitchell. Vide* Craig, page 257.] But the scruple lies here; whether they all being called, he will get each of them decerned to pay *in solidum*; which seems hard, seeing not any one, but all of them, represents the defunct *adæquate*. And it appears by Hope, *folio* 114, *in observationibus patris ad Titulum de Hæredibus et hæreditatibus*, and Dury, who sets down the same practique more at large, at the *7th of February* 1632, *Home* against *Home*, that the Lords were not altogether so clear in this point, yet inclined to cause them all settle *pro indiviso*; (seeing the creditor is not obliged to acknowledge any division made by the sisters amongst themselves; see another reason, in *L.* 27, *parag. ultimo, D. de Peculio;*) and not to burden any one with the payment of the haill, suppose she had succeeded to far more than the debt acclaimed extended to, unless the other sister or sisters should prove bankrupt and insolvents for their proportions, in which case they thought it just to give recourse against that sister who, though she had paid her own part already, yet still brooked some of the defunct's lands and goods, and so long must ever be liable to his debts. This was only attempted *in transenna* but not fully decided. And I find it to be most consonant to the common law, *ubi plures hæredes tenentur creditoribus hæreditariis, non in solidum sed tantum pro partibus hæreditariis; L. 2, par. ult. L. 3, D; L. 6, et L. 23, C. familiæ erciscundæ; L. 25 et 26 C. de Pactis, et lege 2 C. de hæreditariis actionibus; lege 2 C. de annonis et tributis:* only, if one of them turned poor, they refused regress against the rest, for recovery of his part; *L. 33 et L. 34 D. de Legatis, 2do. Sic Perezius ad Tit. C. Familiæ erciscundæ, No.* 6. It was otherways *inter confidejussores ante litem contestatam insolvendo factos; L.* 51, *par.* 4 *D. de fidejussoribus*, 17.

Advocates' MS. No. 326, *folio* 180.

1672. *February* 18. PATRICK SMITH of Bracko *against* ROSSE of Balnagoun.

THIS defender's goodsire having wadset some lands to umquhile Sir John Sinclar of Stevinson, upon the reversion of 25,000 merks, he thereafter disponed the reversion of the wadset lands to Sir John Sinclair of Dunnibaith, (from whose heirs of line Bracko derives right,) with absolute warrandice. After the disponing of which reversion, old Balnagoun dispones the same wadset lands irredeemably to Mr. Thomas M'Keinzie, with all reversions, discharging and renouncing the same. This seeming to be a clear contravention of the warrandice, being double aliena-

tions of the same thing, Bracko has intented summons against Balnagoun, as representing his goodsire on the passive titles, for recourse of warrandice, and for payment of the sums paid by Dunybaith for the said reversion, &c.

Against which pursuit it was ALLEGED, That there was no breach of the warrandice incurred, (always denying the passive titles,) because the disposition of the reversion made by Balnagoun to Dunybaith was not a simple and absolute disposition, but clogged with a back-bond, whereby Dunybaith obliged himself to relieve (redeem) that wadset of Steinson's, and then to grant a reversion in favours of Balnagoun, for redemption of the same lands, upon payment of 36,000 merks: and so Dunybaith's own right by the said backbond being only a redeemable right, Balnagoun might very safely, without incurring any warrandice, dispone the lands irredeemably to Mr. Thomas M'Keinzie; wherein Dunybaith's backbond and reversion is not only expressly narrated, but M'Kenzie is assigned thereto. Which backbond, Dunybaith thereafter *viis et modis* destroyed. Whereon being pursued, and the tenor of it referred to his oath, being conscious to himself of the trust, he would not compear, and so was holden as confest thereon.

Then Bracko insisted for the sum of 11,000 merks, which was farther contained in Dunybaith's backbond than was in Stevinson's wadset, to the reversion whereof he was assigned: Stevinson's wadset bearing only 25,000 merks, and Dunybaith's retrocession or backbond bearing 36,000 merks: together with the annualrent of the said 11,000 merks since the year 1643. To this it was ANSWERED, That Dunybaith, by his backbond, being obliged first to redeem Stevinson's wadset and then to return the lands back to Balnagoun upon his payment of 36,000 merks, unless he has redeemed Stevenson's wadset, or can produce the same, that from it it may be apparent what sums were truly due by (on) that wadset, he could claim nothing; and if the haill 36,000 merks be found due by that wadset, then he would have right to nothing: till which be produced the superplus cannot be known nor the damage liquidated, in case warrandice were inferred; and the disposition to Mr. Thomas M'Keinzie, bearing Stevinson's wadset to be for 25,000 merks, is not sufficient, the same only being narratory; *et non creditur referenti nisi constet de relato.* To this it was REPLIED, That Dunybaith would have redeemed Stevinson's wadset had he not been excluded by the irredeemable disposition of the lands, and discharge of the reversion, given by old Balnagoun to Mr. Thomas M'Keinzie, which Mr. Thomas redeemed the lands from Stevinson and those who came in his right. TRIPLIED, They redeemed not the same by order of law, but by voluntary transactions with the party having right, and so there is no warrandice inferred, because his right would ever have been preferred to M'Keinzie's, (suppose we were not in the case of a backbond, as we are;) which was no ground in law whereon Dunybaith's right was either weakened or prejudged; so that his not redemption was in his own default, no action being ever moved against him at M'Keinzie's instance for taking away his right, nor was he disturbed therein by order of law.

The Lords found the posterior alienation made by old Balnagoun to M'Keinzie was not a sufficient foundation for an action of contravention of warrandice, unless by a preceding sentence Bracko could show a distress declared, and that he was legally debarred. *

* But in Stair's printed Decisions, at this place, the Lords altered this, and sustained it as a sufficient distress. See it there.

Against the which interlocutor the pursuer reclaimed, and produced a clear practique in the contrary, marked both by Dury and Hadington on the *6th of March* 1623, *Robert Hamilton of Newhouse* against *Mr. David Sharp, parson of Kilbryde*, where a man having set a tack of teinds, and obliging himself not to contravene, yet setting a second tack to another, it is in the first tacksman's option either to pursue his author for contravening his bond, or the second tacksman for spuilyie; and the allegeance that he was not debarred by law, and that there was no sentence finding him distressed, that it was his own fault, seeing notwithstanding of any posterior tacks he might have possessed, (all which is the very triply made for this defender, and which by interlocutor was found relevant,) is repelled as irrelevant.

The 105th act of Parliament in 1540 is very severe against all such as make double alienations, and declares them infamous and punishable in their persons and goods at the King's will: but I suppose *quoad* the extremity of it, it is gone in desuetude. *Vide omnino legem* 3 *C. de evictionibus*; and *Peresius on that title, No.* 19.

Advocates' MS. No. 327, *folio* 130.

1672. *February* 13. Anent Deeds by Minors.

There is a great difference between deeds done by a minor having curators, without their consent, and deeds done by a minor wanting curators: * for deeds of the last kind must be revoked, and reduction thereof raised within the profitable years, else they stand unquarrellable: they cannot be annulled unless lesion be likewise conjoined and proven: the exception of minority against such deeds is not receivable by way of reply or exception, but only in an action; such deeds are not *ipso jure* pure null, but valid ay and while they be lawfully taken away: an oath given by such a minor, swearing that he shall never come in the contrary thereof, (and a wife granting bond without her husband, and swearing the same, will be in the very same condition,) will so corroborate the deed that he will never be permitted to impugn the same: and finally of this case the authentic *Sacramenta puberum in Tit. C. Si adversus venditionem* must be understood; whereon the D D. and commentators teach that *contractus in se validi tantum confirmantur juramento apposito, non vero contractus de jure invalidi.* Whereas a deed done by a minor having curators, without their consent, is an act absolutely null of the law, needs no revocation, no reduction, may be quarrelled at any time thereafter *etiam quadriennio elapso*, imports lesion without any other probation, may be objected at any part of the process *via exceptionis vel replicæ*, the party only proving that they had curators the time of the said deed; yea, to sum up all, it is so far null that an oath *(quoad semper est servandum nisi vergat in æternæ salutis dispendium vel in alterius prejudicium redundet,)* ties him not to the ob-

* All thir differences result from the common law. *Vide L.* 3 *C. de in integrum restitutione Minorum*; it is a constitution of Maximinian and Diocletian. *Vide* Craig, *pag.* 83. *Vide supra, No.* 302. [16*th January*, 1672.] See *Vinnius lib.* 1 *Quæstio. cap.* 15. *Vide* the Books of Sederunt and the compend thereof, at the 20*th* of *December* 1599, act anent the *Laird of Bathayok.*

servance of any contract made by him without consent of his said curators, but restores him against the same; because the said deeds being *ipso jure* null, there is no act whereto the oath can be accessory; *quod non est nequit confirmari; non entis nulla dantur accidentia, nullæ qualitates.* *Sic* Hadington, 15*th December* 1609, *Constable of Dundy.* *Sic* Perezius, *in Paratitlis ad supra-d. Tit. C. Si adversus venditionem,* who shows that the canons order all oaths given by minors, without distinction, to be sacred and inviolable, *cap.* 28 *ext. de jure jurando,* but that the French law rejects all such oaths *ob lubricitatem ætatis, in qua æque facile est iis jurare ac contrahere,* and restores minors against them whether they be adjected *contractui valido vel invalido; nam quæ contra legem fiunt, nulla stipulatione, nullo mandato, imo nullo sacramento firmitatem capere debent; L.* 5. *in fine C. de legibus. Vide L. septimam, p.* 16. *D. de Pactis, ibique* Gothofredum. Gudelinus, *De jure novissimo, libro* 3*tio, cap.* 14, shows this also to be the law of both *Gallia Celtica et Belgica. Vide infra,* Provost Currie's case, 10*th January* 1680.

Advocates' MS. No. 328, *folio* 131.

1672. *February.* Anent PROBATION by WITNESSES.

ABOUT this time one being pursued to pay the sum of L.40, conform to his bond; he offered to prove payment by witnesses, which he alleged to be lawful for him to do, the sum being within L.100. To this it was ANSWERED, That the payment of L.100 might be proven *per testes,* where the debt was not constituted by writ; but wherever any sum, though never so small, was due by writ, the same can never be taken away except by writ or oath of party. The Lords refused to admit witnesses against writ, though it was *in re tam modica.* And truly this is agreeable to former practiques. See Dury, 15*th July* 1624, *Nisbet* and *Short,* with the quotation on the margin, out of Antonius Faber. See Hadington, 15*th November* 1622, *Macgill* and *Forrest; infra November* 1673, [*Syme* against *Inglis,*] *numero* 429. See Dury 4*th July* 1632, *Dalrymple* against *Closeburne.*

The Lords also refused to admit the probation of a promise of L.20 only to witnesses, but ordained it though never so mean to be proven *scripto vel juramento.* Yet see the contrary in Dury, 25*th February* 1636, *Laird of Ernock.*

Advocates' MS. No. 329, *folio* 131.

1672. *January* 18, and *February.* MR. THOMAS RAMSAY, minister at Mordington, *against* JO. RENTON of Lammerton.

Jan. 18.—MR. THOMAS RAMSAY, minister at Mordington, having recovered decreet in 1656, before the sheriff of Berwick, against Jo. Renton of Lammerton, for pay-

ment making to him of L.360, as Lamerton's proportion of the manse of Mordington, according as the same was appreciated by craftsmen at the command of the Presbytery: whereupon, after the sheriff's precept was disobeyed, having charged him, then minor, with horning, and denounced, and registrate; he now, upon the act of Parliament 1621, ordaining annual-rent to be due after the denunciation, craves by a summons annual since that time, and in time coming, ay till the sum be paid.

It was ALLEGED,—There could be no annual-rent due, because the horning was null, and unorderly executed, in so far as they did not bear that the defender's tutors and curators were charged at Dunse, as the market-cross of the head burgh of the shire where the minor dwelt, which, in form, they ought to have borne, and so there can be no ground for annual-rent.

ANSWERED,—That the minor was personally apprehended; that his mother, who was his tutrix *sine qua non*, and managed all his affairs, was present when it was given, consulted it with her advocates; that the other heritors of the parish, viz. old Mordington, and Pat. Scot of Langshaw, then heritor of Edrington, who were *majores scientes et prudentes*, and as much concerned as this defender, after all imaginary courses taken by them to elude the payment of their proportions, yet were forced to pay the same. That the charge given to him personally, being past tutory, put him sufficiently *in mora non solvendi*, which is the reason whereon the act of Parliament is founded. That the citations given to minors are, indeed, null, if the tutors and curators be not also cited at the market-cross; but that must not be drawn here: because the annulling the citation is only *peremtoria istius instantiæ*, which may be made up by giving a new citation; but here *majus versatur prejudicium*; if the horning be annulled he loses the haill interest of his money, and that most innocently on his part, for the informality or knavery of a messenger. That hornings which are made the ground of declarators of escheat must be strict and formal, but they need no such exactness to the effect of annualrent.

Vide Dury, 28 *July*, 1625, *Rankeillor* against *the L. of Aytoun*.

Yet my Lord Gosfurd found the horning null, even *quoad* the effect of annual-rent, and all others, unless we would say Lamerton was then major.

Then we converted our process unto damage and interest, which Mr. Thomas had sustained through the want of that money these sixteen years; which *damnum et interesse* must succeed *in vicem usurarum*, and are due *nomine pœnæ et ob moram non solventis*; though I call to mind that *ex mora non debentur usuræ nisi in bonæ fidei judiciis*. This my Lord Gosfoord allowed us to do, providing we gave in our condescendence to the adverse party to see. *Vide L. 32, p. 2, L. 35, L. 38, p. 7. D. de usuris, ibique Doctores. Vide supra, num.* 251. [11*th Nov.* 1671, Mathy.] *Vide supra*, No. 198, [5*th July*, 1671, Pitreichy against Geicht.]

In this cause we having only produced the letters of horning and their executions, for instructing the summons; my Lord Gosford refused process till the decreet were also produced, and alleged it should have been given out to see *ab initio*.

Advocates' MS. No. 304, *folio* 125.

February, 1672.—IN the action marked at No. 304, between Mr. Thomas Ramsay, and the Laird of Lamberton, the horning being cast, and no annual-rent found due, we converted it to damage and interest; and having qualified the same

pregnantly enough, yet the Lords refused altogether to grant any, but assoilyied Lammerton therefrom; nowithstanding that in our law the English double bonds are restricted to the single with interest, which is in place of *damnum*. But I think his profession, *(cui de jure canonico interdicitur mercantia illa usurarum,)* made this his claim unfavourable.

Advocates' MS. No. 330, folio 131.

1672. *February.* MR. ROBERT MERCHINSTON, Minister, *against* THOMAS ROBERTSONE.

ABOUT the same time Mr. Robert Merchinston, minister, pursuing Thomas Robertsone, town-treasurer of Edinburgh, to make payment to him of the price of fifty-five bolls of bear, sold to him in 1656, by Mr. James Winrahame; which Mr. James being his debtor in a greater sum, he had arrested in the said Thomas his hands, the price of the foresaid bolls, and now craved to have the same made forthcoming; and produced, for instructing the debt, a precept drawn by Mr. James Winrahame on Mr. Cornelius Inglis of Eastbarns, bearing, that he had sold Thomas Robertsone fifty-five bolls of bear, and therefore desired him to deliver the same to the said Thomas, out of the increase of the lands of the Barnes, Newtonlies, and the acres about Dumbar; and at the foot of it Thomas Robertsone acknowledges the receipt of the said bolls contained in the precept.

ALLEGED,—He cannot make forthcoming, because the receipt produced, unless it had borne an obligement to pay the price, (which it does not,) can never bind a debt upon Mr. Robertsone.

ANSWERED,—A naked receipt of victual is a sufficient constitution of a debt against the receiver, and he must instruct either by writ or oath of party how he paid for it; yea, which is more, though there had been no receipt, if the pursuer should prove that the bolls were truly delivered, it would have undoubtedly bound him to pay the price, unless he could instruct where it was discharged.

The Lords found a naked or simple receipt of victual, imported an obligation to pay the price thereof.

Then ALLEGED,—That this was not a naked receipt, but depended upon a prior onerous cause, and related thereto; viz. to a precept, which in law presupposed payment of the price before Mr. Winrahame, a lawyer, and one exact in these things, would give the precept out of his hands; that the precept must be reputed of the same nature with a bill of exchange, which if protested, then the receiver has his regress to the drawer; even so here. I put the case, Mr. Cornelius Inglis had refused the precept, and to deliver the bolls, are there any doubt but Mr. Robertsone, *actione mandati contraria, ut eum præstet indemnem*, might recur against Mr. Winrahame to the value of the precept? and all that would be allowed him is to prove by Mr. Robertsone's oath, or otherways, that albeit he had given him such a precept, yet he was still unsatisfied therefore, and so *removendus erat exceptione doli mali*. Which point was farther pressed very elegantly by Sir Jo. Cunyghame in his information.

This being taken by my Lord Gosfoord to interlocutor, the Lords demurred exceedingly thereon, whether such a receipt was a sufficient qualification of a debt against the granter, yea or no. At last, before answer to the relevancy of the allegeance, they ordained Mr. James Winrahame to be examined thereupon; as also Mr. Robertsone to adduce such witnesses as were present at the numeration of the money (if any was,) with what other adminicles he could adduce for evidencing the payment.

Upon the pronouncing of which interlocutor the pursuer produced a decreet wherein Mr. Winrahame, being pursued already for relieving him of that sum, has deponed and denies, that to his knowledge, he was ever paid for these bolls of bear; which being seen, my Lord Gosfoord would suffer no probation which would any way choke the oath to be led, and therefore, with very much precipitation decerned Mr. Robertsone to pay the price acclaimed; so that Mr. Robertsone's referring it to his oath in the other process was the neckbreak of this.

Advocates' MS. No. 332, folio 132.

1672. *February* JOHN MAISSON *against* ISOBEL RIND, *Relict of* JAMES MURE, and OTHERS.

IN January, 1672, there was called a reduction intented by John Maisson, portioner of Innerask, against Isobel Rind, relict of umquhile James Muire, and several other persons, heritors and possessors of a tenement of land lying within the town of Edinburgh; the case was as follows:—

John Laury, merchant in Edinburgh, dispones to Henry Seaton, his good-brother, in *anno* 1612, a dwelling house in Edinburgh, for relief of sundry cautionries wherein Henry stood engaged for him, with this provision, that how soon he should be relieved and repaid of his cautionries by this disposition, or otherwise, then this disposition to become null, and he, his heirs and assignees, shall be liable to renounce the same to the said John Laury, his heirs and assignees, &c. In 1613, Mr. William Kelly comprises this tenement, disponed, for the sum of 200 merks, contained in a bond granted by the said John Laury to him thereupon; and in *anno* 1631, he dispones and assigns this comprising to John Maison; who now, upon the comprising, intents reduction of Henry Seaton's right, (which Henry had disponed to James Muire, and James dispones it to Isobel Rynd, his spouse, in liferent) against the said Isobel and others, upon this reason, that he offers him to prove the sums of money wherefore the said disposition was given to Henry Seaton, are more than paid by intromission with the mails and duties of the said tenement and others, at least they are relieved thereof by the granter; and so their disposition, conform to the quality it bears in its own bosom, expires, and all that has followed upon it becomes null, and his comprising now takes place.

The pursuer urging we might take a term in the reduction, I ANSWERED, we would take no term, because the pursuer's active title being allenarly a comprising led in 1613, it could never be a ground of this pursuit, because long ago prescribed.

REPLIED,—The allegeance ought to be repelled, because at the time of the leading of the comprising, compearance was made for Henry Seaton, who had got a disposition of the apprised land from the common debtor, and who by Mr. Thomas Hope, his procurator, craved preference; which was accordingly done, and the tenement apprised, but prejudice to Seaton's right. As also compeared a liferentrix of a part of that house, (who even excluded Seaton's self, so that he did not attain the possession of that part till her death,) and got preference *quoad* her liferent: so that this pursuer and his author being debarred by thir two rights from the possession of the comprised lands, no prescription could run against his right, *quia contra non valentem agere non currit prescriptio.*

DUPLIED,—This being only a partial defence, and there being more lands in his apprising than in thir two rights debarring him, and he not being able to show any impediment stopping him, why he might not have done something as to these; the remainder must be clearly prescribed. *2do*, What was liferented is also prescribed, because offers to prove that it is more than forty years since the liferentrix's death, and so since the removal of the impediment. *3tio*, In the comprising, neither is Seaton nor the liferentrix preferred, but only a declaration of the inquest that they apprise, but prejudice of these two rights; yea (which is more,) they could not judge on the competition of rights; and, therefore, seeing they could not debar your author, you ought to have pursued within the forty years, and not having done so, the right is prescribed.

My Lord Craigie found *quicquid erat residuum* more in the apprising than the two above-mentioned rights, prescribed; found the right also prescribed *quoad* what was liferented, we always proving her death above forty years ago. As for the declaration in the apprising about H. Seaton's disposition, whether the same was such an impediment as barred him from all action, he demurred thereon. *Vide infra, No.* 483, [*Macmorran* against *Robertson, June*, 1676.]

If this happen to be repelled, then it will resolve in a count and reckoning; in which (because H. Seaton paid other cautionries for Laury than those for which the disposition was expressly given,) it will fall to be debated if those who derive right from H. Seaton will be bound to renounce the lands, they being found paid of the sums and cautionries expressly enumerated in the disposition, and are the cause thereof; or if they may detain the land till they be paid of all other debts they were constrained to pay as cautioners for Laury the disponer. About which see a little *supra*, at No. 301, [*January* 16, 1672.]

Advocates' MS. No. 333, *folio* 132.

1672. *February.* MAGNUS AYTOUN *against* JOHN LAUDER.

MAGNUS AYTOUN, pursuing for mails and duties upon his apprising of my Lord Ramsaye's lands of Dalhousy and Caringtoun, compearance was made for John Lauder, the first appriser, and it was alleged that Magnus could have no decreet for mails and duties till the first appriser were satisfied by him of the expense of leading his comprising and expeding his infeftment, conform to the act of Parliament in 1661.

To which it was ANSWERED, 1mo,—That all he would be liable in would only be a proportional part, and that effeiring to his sum, there being no posterior apprisers beside him. This was sustained.

Then *2do*, He could pay no part of the said charges, because he offered him to prove, that John Lauder, the first appriser, had intromitted with more of the farms of thir lands since his apprising than the said expense would amount to, and so he could crave none of it from him.

REPLIED,—It is true he has intromitted with more than that expense would come to; but it is as true that any intromission had by him must be *primario* ascribed and imputed in payment of his annualrent, and then *(quod creditor percipit imputat in usuras, et post in sortem, per L L. a Cujacio citatas in Titulo Cod. In quibus causis pignus tacite contrah.) 2do tantum loco* for the expenses of his apprising; now all his possession will not pay the half of his annualrents due by virtue of his apprising.

My Lord Advocate, notwithstanding all the pains we took on him, found that the first appriser's intromission with the duties of the apprised lands must be *ante omnia* ascribed in payment to him of the expenses wared out in deducing and leading his apprising, (which expenses are *sors durior* and so must first be presumed paid,) and then next for payment of the annualrents. *Vide supra*, No. 118, [*Tailfer, January* 31, 1671.] and *infra*, No. 340, [*Home against Preston, June* 15, 1672.]

Advocates' MS. No. 334, *folio* 133.

1672. *February.* Anent WADSETS and REVERSIONS.

IN using an order for reduction of a wadset, the order will apparently be null, if the user produce not the reversion; neither will a copy satisfy; and if he be not the person to whom the same was granted, then *de necessitate* he must also produce the right he has thereto, whether it be by assignation, comprising, adjudication, as heir retoured to the receiver of the reversion, or otherwise; *only, if* a man *ex titulo singulari, videlicet* by a comprising or the like, come to have right to a reversion, it seems hard in that case to force such a redeemer at his order to produce the principal contract of wadset or the principal reversion, seeing it is in his debtor's hands, and he cannot get it; only he should premonish the wadsetter to bring his reversion with him and exhibit it. See *Hope, tit.* 10. of *Wadsets and Reversions, folio mihi* 73. Yet others think no order can be sustained without production of the reversion, and, therefore, even a singular successor, ere he come to use an order, should recover the principal reversion by an exhibition. And Hadington seems to say no less; 19*th January* 1610, *John Reull* against *Mr. William Brown:* Parliament 1469, act 27. Yet see *Dury*, 28*th June* 1628. *L. Newark;* 21*st February* 1635, *Earleston:* and see the same in *Balmanno, verbo Redemptions*, p. 266. See this same decision in the other collection I have beside me of that year 1610.

2 *Advocates' MS. No.* 335, *folio* 133.

1672. *June* 11. The Creditors of SINCLAR of Hirdmeston, Competing.

AFTER the lands of Harmiston were apprised at the instance of a creditor, there is an infeftment of annualrent given forth of these same lands to another party; then comes a second creditor, and he leads an apprising within year and day of the first, and in the multiplepoinding, at the tenants' instance, he craves to be preferred in the mails and duties to the annualrenter, because, though he be posterior to the said annualrenter, yet the first appriser is preferable thereto; and so he must have preference too, in regard of the act of Parliament in 1661, appointing all comprisings led within year and day of the first effectual comprising to come *in pari passu*, as if one only comprising had been deduced and obtained for the whole respective sums contained in the foresaid apprisings; which act draws him back to the date of the first apprising and makes his but a part of it, and so he must exclude the annualrenter.

To this it was ANSWERED,—That the act of Parliament must be understood *cum aliquo temperamento, (verba enim non sunt captanda, nec sensus absurdus iis assignandus;)* that they shall all be reputed one apprising *nisi medium aliquod impedimentum interveniat, ut duo extrema inter se conjungi nequeant:* but here the annualrent becomes a middle stop why retroaction can take no place: * and though the act be silent [as to] this and bears generally, that they shall all be reputed as one apprising, and mentions not what shall be done where voluntary rights intervene, yet in laws *quæ exorbitant a jure communi*, (of which this is one,) whatsoever is not expressly decided and touched is presumed to be left in the decision and channel of the antecedent law corrected; now if our case had needed a decision before the said act of Parliament, it is beyond all limits of debate but the annualrenter would have been preferred to such an appriser. And can there be any thing imaginable more unjust, [than] that after I have done the utmost diligence for securing my money, and found only one inconsiderable apprising on the lands, by reason whereof I judged myself *in tuto* to take a right of annualrent, the land affording more than would pay us both, yet that twenty creditors may afterwards apprise, and all upon a fiction of law (which ought to be consonant to nature, and so to natural equity,) exclude me, that I shall fall nothing? And thus the law shall be miserably defective, not knowing how to secure one from after-facts.

The Lords ordained the annualrenter and second appriser to have the duties of the lands, in satisfaction of their annualrents, *pro rata*, divided amongst them, *pro hac vice;* and as for their preference anent their principal sums, they would advise it in another process wherein it would fall to be debated.

Advocates' MS. No. 336, folio 133.

* Just as *subsequens matrimonium* cannot be drawn back to legitimate bairns, where there are children got of a lawful marriage between; though we decided otherways in King Robert the Second's case.

1671 and 1672. FARQUHARSONE and SPALDING *against* MACINTOSHES.

1671. *December* 2.—THIS is a reduction of a bond granted to thir Macintoshes, upon this reason, that Farquharson's father being taken by them with caption, though the ground thereof stood suspended, (which suspension was intimated,) and carried away to the hills, instead of taking him to Inverness prison, and his son having followed them, they, in his presence, threatened to kill his father instantly, without any mercy, if he would not corroborate the debt, and give them a new bond for the same; upon which most just and natural fear, he granted the bond he now craves to be reduced *ex capite vis et metus.*

To which reason it was ANSWERED,—That the bond could never be quarrelled as extorted, seeing he confesses he himself was free, and no terror-dreader, nor threats made to him, nor violence used against him; and for the *metus incussus patri*, that is not enough to annul a voluntary bond granted by the son.

To this it was REPLIED,—Whatever strength the answer may have where the parties are strangers, yet sure I am it has none betwixt father and son, *qui censentur una et eadem persona in jure; et naturalis pietas nos stringit omnibus modis servare vitam eorum quibus ipsi vitam debemus;* yea, if this bond stand good against the son, it will be equivalent as if it had been granted by the father, because the son will have relief therefore of the father. And to sustain the bond will be a practique immeasurably dangerous in that part of the country. And, therefore, the affrighting the father with death, (though no violence was offered to the son,) is sufficient to invalidate any deeds done by the son in contemplation thereof.

They were to have the Lords' answer whether the reason of reduction was relevant, yea or no. And it was remembered how one having been taken by virtue of a caption which stood suspended, and incarcerated within a lawful prison, and having there granted a corroborative bond for the sum, that he might get his liberty; and having the last session intented reduction of the said bond as granted by him *per vim et metum*, the said reason was sustained and the bond annulled.

It was ALLEGED,—Though the debt in one of the captions stood suspended, yet they had other captions not suspended, by which they took him.

To this it was ANSWERED,—That he must only be presumed to have been taken by virtue of the caption which stood suspended, because they allenarly take a corroborative right for the 2000 merks contained in that caption, from the sons, and no other, which they would not have done had they taken him by the other captions and not this; for hence it manifestly appears they eyed only this caption and not the rest.

They farther alleged, it was at his own desire they took him to *de natura* the hills. Answered, they found the said desire relevant; but being *mandati*, it could only be proven *scripto vel juramento.*

Grotius, *lib.* 2, *de jure belli et pacis, cap.* 11, *num.* 7, *item lib.* 3, *cap.* 19, *num.* 4, is positive, *si quis promiserit prætium ut amicum vinculis injustis eximerit, tenebitur tamen, quia (ut inquit Seneca,) tu a paciscente coactus non es; idem Grotius in annotatis ad superius caput* 11. See 27th July, 1678.

Advocates' MS. No. 278, *folio* 117.

1671. *December* 5.—The said interlocutor being reported, the Lords found, though the violence was only used to the father, and not to the sons, and though the sons granted the bond, and not the father, yet because of the *pietas paterna*, and propinquity of blood, that the bond was null; the reducer always proving the force adhibited to the father, and that there was a standing suspension of the caption by which they took him. *Vide infra*, No. 532, *January* 10, 1677. [*Duke of Hamilton* against *Stewart.*]

Advocates' MS. No. 279, *folio* 117.

1672. *June* 13.—The probation coming to be advised, used in that action marked *supra*, betwixt Macintosh and Spalding, at Numbers 278 and 279; the Lords reduced the bond, because they found the force adhibited to the father equivalent as if it had been done to the sons, and that he was taken with caption, the ground thereof being suspended and the same intimated. *Vide infra*, No. 363, [*July*, 1672, *Essentuly.*]

Then it was ALLEGED,—That the Lords reponing him against that bond as elicited by force, then they must also be reponed against a discharge given by them of all they could ask or crave of him, which they did in contemplation of this bond now reduced, which they accepted in satisfaction of all; and, therefore, they seek regress to what they could have charged him with, before they got that bond. The Lords found the reposition ought to be mutual and reciprocal, and therefore ordained him to deliver up that discharge, and declared that both parties should be in *eodem statu* they were in before that time, as if the said bond and discharge had never been granted.

Then they craved to be reponed to the condition they were then in, *cum omni causa*; and seeing he was now much deteriorated, and diligence done against him since that time, that *cautio judicatum solvi* might be found to them, in case they might prevail in those claims they had against him.

The Lords refused to repone them otherwise than *in statu quo*, seeing it was their own fault and illegal procedure *(ex quo nemo debet lucrari,)* that has drawn them in this *premunire* and prejudice, *et sic tibi imputes.*

Advocates' MS. No. 337, *folio* 134.

1672. *June* 15. ——— *against* STUART of BRUGH and his SPOUSE.

ONE Mrs. Stewart being married upon one Buxton, he, being taken at Worcester, made his escape and went over to the parts of France, where he staid by the space of eight or ten years. His wife, having waited about seven years without hearing from him, supposing him to be dead, married one Mr. Seaton. After they are married some two or three years, home comes Buxton, her first husband, and confesses ingenuously he had wronged her, and occasioned that snare she had fallen in, in never giving her the least notice of his being on life; and, therefore, to make her amends, takes her home and treats her very kindly as his wife. He at last dies, and she marries again to one Stewart of Brugh, in Orkney; and having given a bond in her reputed viduity, betwixt the going away of her husband and her marrying Mr. Seaton, for 700 merks; and she and her present husband being

charged thereon, suspension thereof is raised on this reason, that she was *vestita viro* at the time of the granting, and he does not consent, and so the same is null of the law.

To which it was ANSWERED,—That she was *tenta habita et reputata vidua*, which put the lieges sufficiently *in bona fide* to bargain with her; that she really believed she was such a one, in regard she married again; that a minor affirming himself to be major, though falsely, yet will never be restored against that bond, and so with her.

REPLIED,—*Præsumptio et fictio cedit rei veritati:* now *ex eventu*, it appeared she was then clad with a husband, though in regard of his absence the common presumption ran to the contrary; and, therefore, the bond must be void and null. *Item*, there was no dole in her, as in the minor's case.

I think the reason of suspension not relevant.

Advocates' MS. No. 338, *folio* 134.

1672. *June* 15. MR. PATRICK HOME Advocate, *against* MR. JOHN PRESTON Advocate.

IN the action between Mr. Patrick Home and Mr. John Preston, advocates; Mr. Patrick having right to the lands of Broomsbank, by virtue of a disposition from William Brown the heritor; and Mr. John Preston having adjudged from the heirs of William Dounie a wadset of these same lands, and a comprising led thereof, he compeared in a pursuit at Mr. Patrick's instance for mails and duties, and craved to be preferred.

Against which compearance of his, it was ALLEGED that his rights and sums therein contained were satisfied by intromission of him and his authors. And so the action resolving in a count and reckoning, it fell to be debated to which right possession ought to be ascribed.

Mr. Patrick ALLEGED it ought to be ascribed to the extinguishing of the comprising, as being *durior sors*, the most sovereign and preferable right.

Mr. John ALLEGED it ought to be ascribed to that whereby he truly apprehended possession, viz. the wadset, and so for payment *primo loco* of the back tack duties; and that William Dounie was long in possession before he led apprising, *ergo*, the possession cannot be ascribed to it.

The Lords, not so much by way of decision, as of consent of parties, would not suffer Mr. John to take the advantage of an expired apprising, and, therefore, ascribed his possession of all years after the deducing of the apprising, &c. *primo loco* to his apprising, that it may become extinct: but ordained Mr. Patrick to pay the just sums yet owing of the comprising, the back-tack duties, the principal sums in the wadset and personal bonds, and their annualrents, as shall be instructed to be owing by Mr. John Preston, and appoint Mr. John to assign his rights to Mr. Patrick. *Vide supra*, No. 334, [*January* 1672, *Aytoun* against *Lauder*.]

Advocates' MS. No. 340, *folio* 135.

1672. *June* 15.

A DECLARATOR of property being called, it was ALLEGED there could be no process upon the first summons, because it was only upon six days; whereas it should have been upon twenty-one days. REPLIED,—It was privileged. DUPLIED,—These privileges were but granted *periculo petentis*, and so could not defend.

This being taken to interlocutor, the Lords found no process upon the summons, as evil raised and executed; and for shunning the like error in time coming, they did make an act of sederunt, that all declarators should be upon twenty-one days warning. *Vide supra*, No. 199, [*Macraw* against *Lord Macdonald*, *July* 5, 1671.] See the act of sederunt now regulating this. *Vide supra*, No. 303, [*Town of Stirling* against *Unfreemen of Falkirk*, &c. *January* 18, 1672; *infra*, page 642.]

Advocates' MS. No. 341, *folio* 135.

1672. *June* 20. ANNA CARSTAIRS and SIR JOHN RAMSAY of Whythill, her Husband, *against* CARSTAIRS of Kinneuchar, her Father.

BY contract of marriage between Kinneuchar, and —— Ainslie, daughter to Andrew Ainslie, merchant in Edinburgh, it is provided, that if there shall be only one daughter of the marriage betwixt them, then and in that case, she shall have L.20,000, which is appointed to be payable to her at her complete age of fourteen. This Anna being the only daughter of the marriage, and being now eighteen or twenty years old, pursues her father for implement of that clause in the contract; and subsumes, that there is no possibility that any more bairns can exist of this marriage, seeing the father is furious and fatuous, and upon that account, separate from his wife, and besides, she is fifty years of age, and so past that term established both by lawyers and physicians for bearing of children; but if the Lords please, the pursuers offer to find sufficient caution that they shall make a proportional part forthcoming, if so be there happen to be any more bairns of the marriage.

To this it was ANSWERED,—That it was a very unnatural pursuit for the daughter to vex her father, rip up his infirmities, and thereby add affliction to the afflicted; that there was no natural impossibility why there might not be yet other bairns of the marriage beside her, and though they do not cohabit presently, yet they may cohabit afterwards, and his furiosity may rabate.

The Lords refused process at her instance, and superseded all action for the principal, till the decease of one of the parents; yea, they demurred whether they ought to decern for the annualrents in the mean time, or if the same should not rather be restricted to a mean aliment during the lifetime of the two parties together.

Advocates' MS. No. 342, *folio* 135.

1672. *January* 16, and *June* 20. SANDILANDS of Couston *against* The EARL of Hadington.

January 16. IT was this day debated, whether a man having sold lands with absolute warrandice, and that they were free of all incumbrances and inconveniences whatsoever; the buyer afterwards finds they owe a servitude of thirlage, pasturage, or the like, to his neighbour's mill or lands; the question is, if he will get relief of the seller, upon the clause of absolute warrandice, because of this servitude or burden. *Advocates' MS. No.* 299, *folio* 124.

June 20. IN this action came to be debated that question marked by me *supra* at No. 299. The Earl dispones some lands to this defender, with absolute warrandice from all wards, reliefs, non-entries, recognitions, &c. and from all dangers, burdens, and inconvenients whatsoever, as well not named as named, &c. as also he dispones the lands *cum molendinis et multuris*. Before the disposition, there is a bond of thirlage of thir lands given by the former heritor to another man's milne. Couston finding so considerable a servitude and burden upon his lands, pursues the seller upon the warrandice for relieving him thereof; and ALLEGES, that where he had bought these lands at eighteen years purchase, he would not have given fifteen if he had known them to be affected with such a burden; that it would put us all to immeasurable trouble, if they should not sustain prior thirlage to be a contravention of the warrandice; that the general clause, of all other burdens should then have no signification; and that thirlage, pasturage, and all other things that can any ways make land of less value, must hereafter be specially inserted and warranted against. It may be as well said that a prior infeftment of annualrent granted by the disponer falls not under the warrandice, seeing it is but a servitude no more than thirlage. *Vide omnino l.* 75 *D. de Evictionibus, ibique DD.*

The Lords found that a man selling lands with absolute warrandice did not thereby oblige himself that the lands were free of astriction; and therefore found a constitution of a thirlage by the disponer, prior to his disponing, no contravention of his absolute warrandice.

My Lord Chancellor carried it in behalf of his nephew; but my Lord President reclaimed exceedingly, and protested it might not be a preparative for other decisions in time coming.

Vide Joan. Superioris procemium ad T. de Servit. in fine cap. Vide leges 169 *and* 189 *D. de verborum significatione, ibique Alciatum et Wissembachium.* *Advocates' MS. No.* 343, *folio* 135.

1672. *June* 22.

ONE being pursued for payment of a sum, he ALLEGED the same was a public debt, contracted upon the occasion of the late troubles; and that by act of Parliament in 1669, these debts were all suspended till they should give farther order thereanent.

REPLIED,—That the said act of Parliament has been found by the Lords to suspend only such debts as were contracted by the committee of estates, but not those which were only due by the committees of shires; of which last kind this debt now sought is. *Item*, that it is their own fault they are not paid, since in Midleton's Parliament they got a commission for stenting the shire till they were repaid.

DUPLIED, the Lords have made no such distinction of public debts; and that nothing can be imputed to them why they made not use of the said commission, because the said act of Parliament has supervened as *medium impedimentum*; and as it suspends all public debts, so also does it tacitly suspend their commission.

Advocates' MS. No. 345, folio 136.

1672. *June* 22. KER *against* SCOT of Horsliehill.

ONE Ker pursuing Scot of Horsliehill to make arrested goods forthcoming, the process was casten, in regard the arrester had not called Bell of Belford, his principal debtor, who, if he were cited, might allege the debt to be paid.

Advocates' MS. No. 346, folio 136.

1672. *June* 22. The TOWN OF DUNDEE *against* The EARL OF FINLATER.

AT this time I got account of an action pursued lately by the town of Dundy, against the Earl of Finlater. The case was, the town having suffered a prisoner to escape, and being convened to pay the debt, there is decreet given against them *in foro contradictorio;* whereupon they capitulate with the creditor, and pay him upon this condition, that he pursue the Earl of Finlater as oy and heir to the deceased Earl of Finlater, who was cautioner in the bond; which he condescends to.

It was ALLEGED for Finlater, that he offered him to prove, by the pursuer's oath, that this pursuit was to the behoof of the town of Dundie. Which being granted by him, then he alleged that there could be no process at the town's instance against him, who was only the oy and heir of a cautioner, because what they had paid it was *in pœnam delicti*, whereof they could have no repetition save off the principal debtor, whom they suffered to escape furth of their prison. *Quod a quoquam pœnæ nomine exactum est, id eidem restituere nemo cogitur; pœnæ depensæ repeti non solent; l.* 46 *D. de regulis juris.* That they are now come in place of the debtor, who could never have pursued him, *ergo*, neither can the town. *Vide etiam l.* 203 *D. de R. Juris.*

They say that the Lords assoilyied him from the pursuit. I think it was very hard measure.

Advocates' MS. No. 347, folio 136.

1671 and 1672. The EARL OF ARGYLE *against* The LAIRD OF M'NAUGHTON.

February 13, 1671. THIS is a declarator of property of the forest or mountain of Benbowie. Against which, ALLEGED, for M'Naughton,—That the same was properly his, lying within the bosom of his lands, environed thereby at three corners, and lying open only at one; it was also contained in some of his seasines; he had been in possession of it these hundred of years, by all deeds and acts of possession and property, and by debarring the pursuer from the same.

ANSWERED,—That any acts of possession he had, were only as subforester to him, and so can never be relevant to infer property; whereas the Earl possessed by all acts of dominion that can be condescended on. And it were a strange thing in the Highlands to hear any doubt who were heritor of that forest, since it was never controverted there but it is the Earl's; and he has slain 150 deer in it at a time, and has interrupted any possession the defender had. *Item*, there is quinquennial possession retoured, anterior to the forfaulture; which is enough to the king and his donatar, by act of Parliament.

They being both alike pregnant in their allegeances, there is a mutual probation appointed them *hinc inde*, for leading witnesses upon their possession.

They will both get witnesses enough, to prove what they please.

Advocates' MS. No. 131, *folio* 90.

June 25, 1672. THE Lords having considered the probation used in the action marked *supra*, at No. 131, betwixt the Earl of Argyle and the Laird of M'Naughton, they find the forest contended for, to be a part of my Lord Argyle's property, and therefore decern M'Naughton to remove therefrom.

Every one foresaw this would be the state of that action, considering the pursuer's probable interest in the President. *Advocates' MS. No.* 348, *folio* 136.

1672. *June* 25. SEATON of Gairleton *against* The DAUGHTERS of SIR ROBERT SEATON of Windygaule.

UMQUHILE Sir Robert Seaton of Windygaule having made an excambion with his brother, the Earl of Winton, whereby in lieu of his lands, he got an heritable right in my Lord Dumfries his lands; to which sums, Gairleton, as heir, laying claim, compearance was made for Sir Robert's sisters, who alleged the said sums behoved to belong to them, who would be his executors in law, because made moveable by Sir Robert in his lifetime, in so far as he required them and charged the debtors with horning, *quo facto animum declaravit.*

Against which it was ALLEGED,—That the same ought to be repelled, in regard they offered them to prove that it was never his intention to transmit this sum to his executors by the said charge; seeing *esto* he had got it, he intended *simul et semel*, to have wared it on land. He was frequently heard say his sisters should never have a penny of his means; yea they themselves in their ordinary discourse, boast, that good providence has thrown that in their lap which their brother never designed for them. That the bond charged on, was but a bond of cor-

roboration of an heritable security; and so, as an accessory, *debet sequi naturam principalis*, and not turn moveable but by a requisition, which they cannot show.

Notwithstanding of all which pregnant qualifications of his *propositum et animus*, they found the sum, as moveable, to belong to the sisters, who were executors.

This was judged hard; only Gairleton had the misfortune to be generally ill-loved, and the ladies found favour with my Lord Chancellor, who is an enemy to none of that sex if they be handsome.

Then Gairleton offered to improve the executions of the charge of horning, hoping that it might be found that the messenger had not two witnesses with him at the time he gave it.

Advocates' MS. No. 349, *folio* 136.

1672. *January* 25, and *June* 26. The EARL OF QUEENSBERRY *against* The DUKE OF BUCCLEUCH.

January 25. SCOT of Newton, Chamberlain, holding some lands ward of the Earl of Queensberry, and others likewise ward of the Duke of Buccleuch, and the marriage existing, it fell to be debated which of the two was the oldest superior, to whom in law the marriage will be due. It was not controverted but before the Earl of Bothwell's forfaulture he was the oldest superior; but the question ran on this:—Bothwell was forfaulted; and because this gentleman was not confirmed *quoad* that land he held of him, his land fell also under the compass of the forfaulture. Buccleuch gets the gift of Bothwell's forfaulture, as also of this gentleman, who giving him back his lands, retained the superiority; whereon it was alleged that though the *feudum* held of old of Bothwell, and *eo nomine* he was the oldest superior; yet the *feudum antiquum* was extinguished by the forfaulture, and the new gift from his Majesty, or Buccleuch, was *novum feudum*, and to be reckoned allenarly from the date of the new charter, and so Drumlanrick was now the oldest superior.

This cause was well reasoned and illustrated from many similes taken out of the feudal law; which see in the informations beside me. *De quæstione, an feudum post feloniam commissam restitutum* be *novum* or *antiquum, vide Matthæum de Afflictis, ad rubricam* 14, *libri* 2 *Feudorum*, No. 7, p. 327.

Advocates' MS. No. 312, *folio* 127.

June 26. THE Lords coming to advise the process marked *supra*, about Chamberlain Newton's marriage, at No. 312, they found, if seasine had followed upon that charter mentioned in the informations, then that the marriage would have belonged to Bothwell, as to the oldest superior; but since the vassal had not made use of that right, but taken a new one, which made it *novum feudum* in his person, and possessed by it, they found Queensberry the oldest superior, and therefore adjudged the casualty of the marriage to him.

Advocates' MS. No. 350, *folio* 136.

1672. *January* 18, and *June*. The TOWN of STIRLING *against* the UNFREEMEN in FALKIRK and KILSITH.

THE Town of Stirling having charged the unfreemen within the Towns of Falkirk and Kilsith, to find sufficient caution that they shall desist from trading, conform to the act of Parliament in 1633; which charges they suspended and found caution; now they are pursued for contravention of the acts of Parliament, and the caution found by them, because they export, import, and retail, which are the solid privileges of the Royal Burghs. At the calling of this action it was declared, that Stirling and the Burghs Royal did insist only *pro loco et tempore* to have them debarred from exporting and importing.

ALLEGED, 1*mo*, The summonses are ill executed, being only on six days, whereas they should have been on twenty-one. 2*do*, They should have been continued. 3*tio*, There is no active title produced, because Stirling's infeftment and erection is not produced. 4*to*, Falkirk is not within their freedom, and so they cannot charge them to find caution. 5*to*, My Lord Callender, as lord of the regality there, should be called. 6*to*, The Lords cannot meddle with the limits between burghs royal and burghs of regality and barony, at least they have waved the same hitherto. 7*to*, They are content, of their own consent, that import and export be appropriated to burghs royal, providing retailing (which cannot be denied for the conveniency of travellers and others,) be permitted to them. *Vide infra*, *No.* 341, [15*th June*, 1672.] *Vide* Dury, 4*th February*, 1630, *Edinburgh* against *Leith*.

To thir it was ANSWERED,—That it needed not be on twenty-one days, because it was both privileged and accessory to the act of Parliament, and their acts of caution, and to a decreet of suspension in 1644. To the second, that it was continued. To the third, no necessity to produce Stirling's infeftment, *quia notorium, quod non debet probari sed tantum allegari*. To the fourth, the agent for the haill burghs concurred. 2*do*, Any of the royal burghs may pursue unfreemen, though in Caithnes, especially when they contravene the acts of Parliament. To the fifth, 1*mo*, Not verified nor made constant that it is a regality. 2*do*, None need to be called but the contraveners, who cannot pretend to be freemen. To the sixth and seventh, oppone the act of Parliament, 1633, and refer them to the Lords.

The Lords repelled all thir dilators, and ordained the regalities to be heard *in causa*, why they should be discharged to export or import; especially since they bear burden in all taxations, and unfreemen bear none.

It was pretended that King Charles, by a letter, had desired the Lords to leave the redding of these marches to the Parliament. ANSWERED,—this being *mandatum* it expired *morte mandatoris*. *Advocates' MS. No.* 303, *folio* 125.

FOUNTAINHALL'S PLEADING FOR THE TOWN OF STIRLING.

1672. *June* 25.—*Presente Regio Commissionario.*

MY LORD COMMISSIONER,

May it please your Grace; what happiness and cheerfulness the eminent and most eloquent of all the apostles, St. Paul, expresses when he is put to plead his cause before

Festus and Agrippa; because the one had long been a judge to his nation, and the other was expert in all the customs and questions which were among the Jews: the same gladness possesses the town of Stirling, and with them the whole royal burghs, that they are to plead in behalf of their privileges this day before your Grace, the great patron and conservator of them. My Lord, if they should deduce them at large, they are afraid they shall consume more time than is permitted for all the advocates to speak in this case. My Lord, be pleased to know that the town of Stirling finding a sensible decay in their trade, through the unjust encroachments made upon their privileges by some unfree traffickers within the town of Falkirk; they caused charge them to find sufficient caution in your Lordships' books, that they should desist and cease from using the privileges only granted to the royal burghs: which charge, though they did obey, and accordingly found caution, yet their contraventions since have been so frequent, so grossly palpable and prejudicial, that the town of Stirling could not be so far wanting to their own interest as to dissemble the same any longer; especially considering that these actings strike at the throat, and tend to the prostitution, yea the final subversion not only of their liberties, but of those of the whole regal burghs in Scotland. Upon this principle of pure and absolute necessity, the town of Stirling, with concourse of his Majesty's advocate and the agent for the burghs, have raised a declarator of contravention against the said persons, for breaking not only the acts of caution found by them, but also the acts of Parliament, whereunto the same are accessary: and not only the acts of Parliament, but likewise a decreet of suspension recovered *inter easdem personas* in 1644; with a declaratory clause, that exporting, importing, and retailing, are the privileges of the royal burghs privatively to all others. At the calling of which action the pursuers were so well natured, and so complying with that which is esteemed by some the public good of the kingdom, that they declared, they insisted not *hoc loco* for tapping or retailing, but allenarly on export and import. This generosity was so far from producing the effects that might rationally have been expected from the defenders, that they now begin to controvert these rights, which, if the burghs royal had *mordicus* adhered to a declarator of their haill privileges, *in tota latitudine*, would never have suffered the least debate; I mean export and import. I confess they want not shadows of pretences, why these two important privileges should not be wholly enhanced or monopolised by the burghs regal; but I hope to make it appear that they are but colours, and no more. O, say the patrons of regalities, the laws whereupon the pursuers found their privileges, are contrary to that natural liberty and freedom wherewith every man is invested, every man is doted, so soon as he is born; and, therefore, are unjust, exorbitant, and null. That, by the law of nature, and primitive law of nations, each man has an undoubted, uncontrollable, unlimited power and faculty of commerce or trading with whom, where, and in what manner he pleases. That the countries where trade has received its greatest dimensions and lustre, its most glorious and eminent encouragements, viz. Holland, (which we may propose for a pattern in this, though in nothing else,) the footsteps of the law of nature are closely followed; every freister and milkmaid having freedom to trade, and which is known to all, they actually do it: that he, who has written The Interest of Holland, a book so much cried up by many, lays down this for a fundamental; that by what degrees trade suffers restraint, by the same very steps does it suffer diminution; that every law anent trade, is an impediment to trade; and where it is most unbounded and most free,

there it will flourish most. That hard at all the gates of the city of London, are unfree merchants and tradesmen, who, in spite of all the opposition made by the inhabitants of London, bruik now peaceably their privileges, so profound a root, so deep an *impresa* has nature left of this her free gift upon the spirit of all men. That the acts of Parliament, introduced in favours of the pursuers, are destitute of those two great pillars, whereon all laws (especially such as retrench our natural liberty) should be founded, viz. Justice and Equity. That *ratio est anima legis*:* that for want of reasonableness and possibility, (two qualities that must be found in every act, else it is not a law, as wanting its essential parts,) they have long ago sunk and lain buried under the load of their own ruins. That the regalities have prescribed immunity from that slavery wherein they were blindfolded by the pursuers; that they have prescribed a communication, and an equal right to their privileges now under debate: that the laws are in desuetude which gave the royal burghs these liberties; and not only in desuetude, (which the best lawyers make to be induced *per non observantiam decem annorum*,) but also a contrary observance and consuetude have prevailed against them. That observance is as essential a requisite to a law, as sanction, promulgation, or the like; yea more necessary than any of these, since without observance it is but a dead letter. That there is a great difference to be made between a law that never attained observance, and a law that once was observed, but has long lain in desuetude; the second is, indeed, a law, because it had once a perfect and a consummate being; the first is no better than an embryo, and deserves not the name of a law; and of this kind be the acts founded upon by the pursuers. That the regalities have possessed all these privileges immemorially. That all this has befallen the burghs royal, they not conniving, but using all the imaginable courses in the world to vindicate their liberties from injurious oblivion, keeping them from falling headlong into not observance, and reviving them from time to time; yet such is the invincible strength of nature and its dictates against monopolies, that all superstructures disproportionate to the foundation must bow and crumble to atoms before her. That the highest the pursuers can screw their grants, as to time, is the reign of King James the Third, *in anno* 1466; that they took no effect all his reign; therefore they procured a new act and ratification from King James the Fourth, in 1503, cap. 83: which acts not being able to do the turn, their breach lies over unquestioned till King James the Sixth's days, who sets them on foot again, but still *irrito conatu*. Does he not declare by his 152nd act of his 12th Parliament in 1592, that the said privileges were not, at that present, yea never were, in use and observance at any time of before? That none of these acts speak *totidem verbis* of exporting and importing, but mainly of not selling wax, wine, silks, spiceries, wood, wadde, &c.; a thing so ridiculous and so grossly choaking all public conveniency and utility, and whereof we cannot say it was exploded and banished, since it never once took place. That at the time when these privileges were first conferred, trade was in its infancy; merchants were few, and merchandizing was a mystery. Have they not been mighty expert in this trade, when none durst sail betwixt St. Jude's day and Candlemas! See act 14. in 1466. Our estates were like gropers in the dark, not knowing whereon to fix; and if they in those ignorant times, participating more of barbarity than of any thing

* *Sæpe in judiciis, quoad credebat conjectura prodesse, experimento invenitur inutile. Novella* 111, *in præfatione.*

else, mistook the knack, and supposed they had hit the head when it may be was but the thigh, shall we doat so far upon antiquity as to forego our visible benefit, and support an inconvenient and intolerable custom? But we shall be charitable, (say they,) and suppose what they did was consonant with the exigencies of those times.* Yet who is ignorant how changeable and inconstant the *ragioni di stato* and interests of kingdoms are? What was suitable and fit twenty years ago may but quadrate very sorrily now: the stating of such privileges in an incorporation or company of merchants at that time might not want its own reasons, viz. that they, by unfolding the secrets of trade, might bring it to a consistency, and make it intelligible to every one; but now find no place. Whatever may be said of other laws, yet it holds firm in privileges, (which were called by the Romans *leges privæ seu privatæ,)* that *cessante eorum causa, cessare debet et ipsum privilegium:* that they make a great difference between laws and privileges; that privileges *ipso facto* they are abused, they become void and null: that whatever reason might have been for moving the legislator to confer these grants then, the same not only falls short now, but the contrary reason, as far more pregnant, has elided it and succeeded in its place: that privileges given by a prince ought to continue no longer than he sees cause. † That if a hive of bees from whom honey and substance was expected, prove drones, then they should be driven out, and that protection and countenance transferred for warming and encouraging of others. That it is not only a caveat of the Roman emperors, but also of his Majesty's most wise and prudent predecessors the kings of Scotland, for their judges not to regard their rescripts, impetrated and elicited by private parties, either obrepticiously or surrepticiously, *si sint contra jus vel utilitatem publicam:* that the rescripts in favours of the royal burghs are of this kind. It is against all reason and natural understanding that only Lauder, in the whole sheriffdom of Berwick, shall, as a burgh royal, have the sole privilege of import, export, and retailing, and these to be denied to Eimouth: seeing the one *per rerum naturam* cannot use these privileges, and truly *de facto* there is nothing for the accommodation of the lieges to be had in it; whereas God Almighty, by the natural situation of the other, has destined it for the equal and easy distribution of all necessary commodities to the adjacent country: and yet this providence must be rendered of no use to the inhabitants of that country, because, forsooth, it would break the ease, not of those famous and worshipful men of whom King James the Third speaks, but of a multitude of randy beggars; with which size of cattle too, too many of our royal burghs are now stored. Is this not a most impudent perverting of nature? a most ungrateful turning upside down of her favours? Can there be a more effronted rejecting of her beneficial dispensations than to discharge the use of them? It is well known what unspeakable advantage the endowing of a town in the isle of the Lewes ‡ with royal privileges would have brought to the haill nation; yet the royal burghs, because this would have enlarged that trade whereof then they were the sole possessors, by the help of L.100,000 they got the same dashed. The laws whereon the pursuers found were reputed so hugely unjust, that by universal con-

* *Vide Plinium, Epistolarum Lib.* 1, *Epist.* 20, *in medio.*

† Yet see *Hippolytus de Marsiliis sing.* 531.

‡ This was my Lord Seaforth's design in building Stronway there, *in anno* 1628 and 1629. Mr. John Hay went to court about it. Vide the 263d act in 1597. See the Town of Edinburgh's Council Books the said years, viz. 1628 and 1629.

sent and acclammation they were not only suffered to pass in desuetude, but a contrary, impetuous, vigorous, and fresh custom succeeded. That none controvert but *consuetudo habet vim legis: inveterata consuetudo non immerito pro lege custoditur: leges non solum suffragio legislatorum, sed etiam tacito consensu omnium per desuetudinem, abrogantur: quæ per multos annos uniformiter observata sunt, tanquam tacita civium conventio, recte pro jure et lege servantur: consuetudo præcedens, et ratio quæ eam suasit, omnino custodienda est: cum multis similibus.** Yea the regalities and baronies are founded not only in immemorial possession, but also in express acts of Parliament, viz. the act of annexation of Kirklands to the crown, being the 29th act in 1587; it bears one express clause that those burghs of regality and barony which held formerly of bishops and abbots, and hold now of his sacred majesty, shall continue their use and wont in trading and merchandizing as formerly, shall choose burgesses, elect magistrates, &c. and shall be in no whit endommaged or deteriorated by the alteration. That the unfree burghs were *in anno* 1607, in the open and avowed use of keeping booths, of buying and selling of merchandize, &c. appears from the 6th act of the Parliament holden that year. That his majesty, as he is the fountain of all nobility, so is he the dispenser of privileges, and by the 25th act of Parliament in 1663, the sole disposer of all trade *jure coronæ:* and what privileges the royal burghs claim as due to them, the lords of the regalities have obtained a gift of the same (they are taken word for word off the burghs their charter of erection,) from his majesty, † *ex certa scientia et cum summa causæ cognitione:* and therefore, both standing infeft therein, and being *pares,* the royal burghs can never question the same, because *privilegiatus contra privilegiatum non utitur privilegio.* That it merited consideration how the pursuers, by their own concessions, were the sixth part of the kingdom, so the other five parts are all defenders; and shall there be so little proportion (make it either arithmetical or geometrical as you please,) amongst us as to submit and expose five parts of the kingdom to the lust of the sixth part, to make them all languish to fatten and cram it? We know what diseases follow when the liver grows too big for the body. What reason doth it bear, that an understanding man, well versed in all the points of foreign trade, and who might be very useful, shall be debarred the exercise of merchandizing, because forsooth he is not the son of a burgess, or has not married a burgess's daughter, or has not served his apprenticeship, or has not paid the town and dean of guild's dues, or the like? and to the door they will bolt him, for no other reason but because he is a greater master of his trade than they. What shadow of reason can be found for veiling this ignominy, that in his majesty's great consistory and council there should be such a deluge of mean-spirited persons, slaves to one grandee or other, who can pretend to nothing above nonsense, and yet shall have a vote as well as your grace upon the lives, the reputations, and estates of the greatest persons in the kingdom? Were there not many of the burghs that procured themselves erected, solely because they were oppressed by other burghs; and are they not now so poor and so contemptible that they are begging to be scraped out of the roll, and made free of burden? Who can defend the acts of Parliament from an

* *L.* 32 *et seq. D. de Legibus et Senatus-consultis; toto T. C. Quæ sit longa consuetudo. Vide infra,* numero 387, [*7th February* 1673,] F. Kinloch against Lord Abotshall, in the duply, triply, &c.

† *Vide* Act III. in the Parliament 1587.

unpardonable oversight, (if it may not rather be called a material injustice,) in giving power to such fellows to sit in their own chamber, to erect a court in their own disturbed brain, to give forth decreets in their own favours, and then summarily charge the greatest or the best in the nation, (as their malice shall prompt them,) to find sufficient caution to them? and not only so, but to authorise them (oh strange!) in searching for unfree goods wherever they suspect the same, (of which also they are made judges;) by which means noblemen's and gentlemen's houses may be rifled, at least disturbed, and have no security why their beds and very secretest recesses may not be pried into for commodities. To take away all cause of clamour from the burghs, as though they bore all the burden, (viz. the sixth part of all the taxations imposed,) and the unfree traders eated the sweat, they offer to bear a proportional part thereof, conform to their trade, though they may justly allege they pay to their superiors upon that account already. O how wonderful effects doth the bright and radiant beams of the law of nature work upon the spirits of men! How infallibly doth it guide those who follow its dictates! How amiably consonant is she ever to herself! It is now 140 years since the first erection of the College of Justice: is it not a strange matter, that during all that space the burghs royal have never been able to get the Lords their authority interposed to their privileges? If there was not a favourable juncto at one time, why, in so long a tract, did not one opportunity, one occasion, offer, of a well-sitting Sheriff; especially considering that such a decision could have safely palliated itself under abundance of written law, that it would have been *secundum leges regni, secundum allegata et probata?* Surely no reason can be assigned for this but the monstrous enormity and inequality of these grants, choaking all common practice and utility; which deformity and iniquity have ever so affected the Lords, that they have perpetually subtracted their concourse. Beyond all peradventure ye would all condemn that for a most unlucky and unfavourable action, that, during the interval above mentioned, (viz. of 140 years,) though lying at all advantages, and master of the time when to table it, should never get one leading interlocutor; yet such is the pursuit now in hand. Can there be any thing more absurd than to say that it shall not be leasum for a gentleman, or any other not a burgess of some free burgh, to bring his cows, his corns, his meal, his linen cloth, or the other product and manufacture of the country, and to sell them at the best avail he can, though it be to unfreemen? shall these be declared staple goods, and only vendible to and by members of burghs royal, who shall combine together, and put what unworthy price they please upon them, else they lie in the maker's hands, (none else having power to buy them, or if they do, it is upon their hazard when they venture to retail them;) and when they have by thir unjust means got in all these commodities, then they sell them out to the lieges at intolerable and exorbitant gain, which they know must be given them, since no others (though they could) dare vend these commodities? Do they not drain the country of money, take it abroad, and like Solomon's merchants, bring us home apes and baubles in place thereof? do they not too much foster and obstetricate the never so much increasing luxury and prodigality of this nation? And shall thir conspiracies, monopolies, and masterful oppressions, whereby they grind the face of the people, be any longer established and countenanced by law among us? That the pursuers their decreet of suspension obtained in 1644, militates nothing against the defenders; for though it finds the letters orderly proceeded *ad hunc effectum,*

that the defenders should find caution, yet it expressly reserves the interests of regalities, whereon it is declared the defenders shall be heard whenever any special contravention shall be pursued against them; so that, notwithstanding of that decreet, their cause stands as entire and unprejudged as it did before that time.

There resteth only one idol of the pursuers to be beat down and knocked on the head, that is, the act 24 of the Parliament 1633; which will not cost us much pains, seeing a due and serious reflection upon the premised discourse will blunt its edge to every sober unprejudicated person.

It would only be remembered how it was stolen through *viis et modis*, Sir Jo. Hay, once town clerk of Edinburgh, being then clerk-register: that in effect it is only a private act, and should truly have been no where save amongst the unprinted ratifications: that it falls under the act *salvo jure*, and must receive interpretation and restriction from it *in quantum lædit jus tertii*; that it ratifieth only laws which in effect never came to the consistency of laws, but like an untimely embryo never saw the sun to beautify and pave them with a *viridis observantia*, but were instantly choaked with contrary observance, and were not able to vindicate themselves from injuries, (as all our laws truly touched by our sceptre and thistle will do; *nemo me impune lacesset.*) Shall we contend any longer for that law which is so far from laying any just claim to that noble and high-born epithet of being *munus et inventum Dei*,* that it evacuates and controuls those liberties and providential conveniences which the most wise and good God has bestowed both on ourselves and our country? that it deserves better the name of *communis reipublicæ dissolutio* than *sponsio*; rather the name of the bane of the commonwealth than the bond, (which though is an essential requisite for every good law.) Why then shall we weary ourselves any longer, and strive to uphold a ruinous fabric; strive to infuse life and power into laws which (do what we like) will never absolve, nor condemn, nor exert any other the lively acts of a true law?† Were not this to go about to wash a blackamoor white, whether he would or not? That act 1633, being only a ratification, *nihil novi juris tribuit*: ratifying acts which we have shown to be null, itself falls also to be null; *quia non ens nequit ratificari.* Is it not the voice of nature (whereunto all the laws superadded since do succenturiate,) that *communio est mater discordiarum*, that *nemo tenetur vivere in communione?* because (as the Emperors Theodosius and Valentinian say most elegantly,) where a thing is possessed in common, neither of them thinks they have any thing, because they have not all, and each of them is pleased his part perish, providing his neighbour be involved in the same fatality with him; and yet, in spite of all inconveniencies that can follow, we must be driven in unto this prison of communities and associations, otherwise be denied the use of our natural liberties. In respect of all which, it is humbly expected that the Lords will reject the desire of the pursuer's summons, as most unreasonable, and contrary to public utility; or if they be tender in that, then at least to recommend the redding of the marches between the pursuers and defenders to the Parliament presently sitting, who will be the best interpreters of their own acts; and whatever the Lords shall do with it, the defenders shall cordially and heartily acquiesce in their Lordships' justice.

* *L.* 1. *et* 2. *D. de legibus.* † *L.* 7. *D. de legibus.*

My Lord,

This is the sum of what the defenders ALLEGE in their own behalf; to which, under your Grace's patrociny and favour, I shall endeavour to return a reply. May it please your Grace; though thir defenders would be so unjust as to strip the royal burghs of their privileges, whereto they have right of no younger times than is the erection of this our country into a monarchy; yet we will not follow this bad copy they have casten us, neither will we rob them of their just praise; but on the contrary, ingenuously acknowledge, if this action were to be managed by the beauteous arrangement of words, by the witty and glistening invention of good purposes, smiting, indeed, and astonishing the spirit, but never affecting the heart; if it were to be determined in favours of him who were most adorned with the flowers and gaudy pageantry of eloquence; thir defenders could not miss to gain the cause. But who is he that darkeneth counsel by raising mists and clouds upon the serene firmament of justice? How amiably and invincibly attrayant is the naked and simple face of truth, when once she is manifested and discovered! How naked and ugly do all these false glosses of borrowed eloquence seem before her! How do they evanish, and crawl away out of her sight, as ashamed, and not able to abide or resist her charms. I could repone to their whole defences our numerous acts of Parliament, positively determining and asserting the privileges now controverted, (for if there be any thing positively statuted by our law it is this;) and I might say no more. But this course I will not steer, lest I should seem to put small value upon their discourse, but shall follow it foot for foot, and what appears nervous therein I shall discuss.

The first thing wherewith they begin and with which all alongst they make a great deal of rattling and noise, is, that the privileges of the burghs subvert that natural liberty which every man hath as a man; that they debord from that free and unaccountable power whereby every one may dispose upon his own as he sees fit; that they restrain the nature of dominion, &c. To which it is replied, that this can neither seem strange nor unjust to any sober considerer; there being nothing better known than that there are many rights competent to a man *qua homo in statu meræ naturæ* and abstract from society, which are either denied him, or at least are hemmed in and circumstantiated, when he comes to be considered *qua civis et membrum reipublicæ;* each particular person for the public good having renounced the same of his own consent, and devolved them over upon the city or the chief magistrate thereof. But that I may thoroughly detect the fallacy of this argument, and evidence the defenders their prevarication *in ipso limine,* whereby your Lordships may make a conjecture at the rest, I shall first make it appear it concludes nothing; next *esto,* it did conclude, that then it would prove too much, even by the defenders' own concessions. The first, viz. its non-concludency will be palpable from this one instance: all men by nature are equal; each has a like *jus ad omnia;* we are all naturally free; there is no subordination by nature; none in that state are born to command; none born to obey and serve; every man may avenge the wrongs and injuries done him: *Ergo* the laws of men introducing inequality and subordination, taking away my natural freedom and will, and subjecting me to the dictates of another, retrenching my natural right to every individual, are unjust: *Ergo* the laws sending me to the magistrate for redress of wrongs done to me, who may judge corruptly and and yet may punish me if I seek to right myself at my own hand, are wrongous and exorbitant: *Ergo* the laws introducing policy and magistracy amongst men.

are unreasonable, and derogatory to their natural freedom, divesting them of what bountiful nature had given them. Who doth not see the falseness and the dangerousness of such a consequence? and yet it is the same that our defenders make use of. If the law of nature did admit of no correction, but were to be the sole standard of all our actings, what need was there for the positive laws of men? must they all be condemned and cut off at one stroke, because, forsooth, they add and pare from the laws of nature? But, lest we seem to trifle, is not this the proper office and function of the civil law, to correct and supply what that infant law had not foreseen, and to pare off its superfluous redundances? And though the *jus naturæ præceptivum* be unalterable and inviolable, yet it was never once doubted but the *jus naturæ concessivum* or *permissivum* (of which sort this faculty of free trading is) may be infringed, restricted, alienated, or otherwise disposed upon, at the pleasure of every private person, *quoad* his own interest, or of the haill community and society: especially since the equal and innocent state of nature is now changed by the frauds and artifices of evil men, and new necessities are introduced which nature did not provide for, because in her simplicity unknown; therefore in supplement positive laws are superadded.

And if ye will not follow the faith of my raw assertion, (*nam sæpe refert a quo quid dicatur,*) at least ye will trust the authority of Ulpian, who in *L.* 6. *D. de Justitia et jure* tells us, *Jus civile est quod neque in totum a jure naturali vel gentium recedit nec per omnia ei servit; quando igitur aliquid addimus vel detrahimus juri communi, tunc jus civile, id est unius cujusque civitatis proprium, efficimus.* * But next let the *non sequitur* pass, and we will consider it as if it concluded relevantly; and when the defenders shall see the absurdities they have involved themselves in, it is likely they will retract. Their argument will conclude *nimium;* because, upon what foot of account ye condemn any restraint laid on trade, or the fixing of privileges upon particular associations and incorporations of merchants, upon the same very foot of account ye must vote down the East and West India Companies, with the other societies of merchants which are erected with most ample privileges in Amsterdam, London, and those places where the defenders themselves confess trade has arrived at the highest and most transcendant pinnacle; and to whom, as to her beloved darlings, she has laid open all her secrets, not dealing with them as Eleusina did with those that came to visit her, who kept up ever some rarity against the next time. These companies of merchants retrench that uncontrollable, illimited, and unaccountable power of trading, (which may be called nature's birthright,) far more than our burghs royal do, being in effect monopolies of those trades; and yet to all our kennings they are the great *vena porta* that convoys and diffuses those small rivulet veins of wealth and abundant riches through the haill body politic; and trade is their great Diana. So far are they from finding the inconveniences pretended by the defenders, that to restrain that vagrant and unfortunate sort of trading which thir defenders would be at, they have stated most considerable privileges upon incorporations, which are now arrived at that pitch that they are the most effectual sinews both in peace and war; yea we have seen them able to manage a war

* See Jeremy Taylor on this maxim, at page 204, speaking of the law of natupe; *Gulielmus Grotius, de principiis juris naturalis, capite 2do, item 7mo,* who cleareth that the concessive law of nature is most subject to mutability.

by themselves. Whatever reasons the defenders shall adduce for salving these companies, and reconciling them to their overture for a free and unbounded trade, the same shall I make use of in behalf of the royal burghs, and they shall conclude as pertinently for the one as for the other.

As for the pretence that all are free to trade in Holland, it is REPLIED, 1*mo*, It is false, in regard we have made it appear that their richest trade is enhanced by some few companies. 2*do*, It is an absolute mistake; for no milkmaid or boor there can trade, otherwise than by giving in their stock to some merchant, who holds them count; and any unfreeman may do the same with us. 3*tio*, *Esto* that were the custom of these places, (which yet we deny,) that is nothing to us, who by express act of Parliament * are ordained to live according to the king's laws and statutes, and not be governed by any particular laws or special privileges of other countries. 4*to*, If what suits at one time may be inconvenient at another, (as the defenders themselves argue,) then the true method of carrying on trade in one kingdom or nation may prove a very crooked immethodical and incomplying rule, a *regula lesbia*, if applied to another. No state but has their own proper maxims of policy and government: some stand by peace, others by war; some by the nobles, others by the traders. It is a great inconsequence and fallacy to argue from the practices of other princes and states, each kingdom having its own proper and individual constitution and reason and interest of state, and accordingly have their municipal laws suitable thereto; so that what is fit in on may be destructive in another. And truly for the disparities betwixt us and Holland in this affair, they are so palpable, that they need no demonstration. By a fatal necessity all must there trade or be artizans, there being no other occupations whereto they can betake themselves. Seeing a number made up of one taken out of each hundred will suffice to labour all the ground they make use of; when they have merchandized and improven their stocks to the greatest advantage, on they must still trade, unless they would have their money lie idle, or give it in to the bank at four per cent; because land they cannot get to buy (were they never so willing to retire,) the country being narrow, and the possessors (for gentlemen I can scarce call them,) not being redacted to any necessity of sale. Trade amongst them has attained to full ripeness and perfection, and therefore needs no encouragement nor privileges; whereas with us none will undergo the hazard and vexation of foreign trade if they be not prompted by the sweet bait of advantage and privileges: with us it is not *necessitatis* but *voluntatis*; we have many other employments, wherein we may spend our time more beneficially; and how soon a merchant acquires any little competency with us, straight he wares it upon land, to shun the scourge of collectors, and to secure him against the snares of hard and discouraging laws; others step indeed upon the stage, but wholly ignorant of the part they are to act; thus trade, for lack of encouragement never comes to be understood by us; it wrestles indeed, but it is never able to get up the head. And what may be the reason of all this? Is it not the severe and envious eye the rest of the kingdom holds over them? Is it not the subtraction of that countenance due to them, the having whereof makes other countries flourish, and the want of it renders us beggars? Is it not the having of separate and distinct interests, that solitary and vagrant trade which can never soar to any thing consi-

* Act 48, Anno 1425.

derable? That which cannot be effectuated by one man's judgment or one man's purse, may be easily compassed if two or three concur together.* Those noble and heroic designs, under the load whereof no single man could be able to stand without being crushed, may be brought about if more undergo the same: *ut quæ non prosint singula multa juvent.* Many hands alleviate a burden. Shall we then dissolve societies, cass ancient privileges, deter all ingenious spirits from becoming the conduit pipes for conveying wealth into our country, for bartering such commodities as we need not with these we need, for keeping up friendly intercourse with our neighbours? Shall we cut off the occasions of all high and noble enterprizes? and all this to satisfy the lust and mistaken advantage of some inconsiderable persons, who, by the levelling they project in trade, would in few years, what through their ignorance, what by their misgovernment, infallibly become beggars. And though this seems very plausible to some in the notion, yet in the practice it would prove very unwieldy, and come nothing up to your expectation, but would indeed destroy all the true measures of trade, as has been shown.

5to, The defenders' overtures as to the matter of trade, copied (as they pretend) off the exactest patterns abroad, might be heard, if our judgment were still free, and if we were debating *de lege condendâ vel jure constituendo;* but we are in no such case; the law is already made, the dice is casten, as it was with Cæsar at Rubicon; and if there be any law clearly conceived amongst all our statutes this is it; and so there is no more room left now for debate. The defenders confess, indeed, we have laws on our side: but say they, they are null as destitute of equity; they are gone in desuetude, they are prescribed; a contrary consuetude has prevailed against them; the reason wherefore they were granted has ceased; the first vestige of them was only in the times of King James the Third, and never practised since; that they are rescripts *contra jus et utilitatem publicam, &c.*

To all which it is REPLIED, 1*mo,* If the Emperors have æquiparat the disputing upon their rescripts† and the questioning the merit of those upon whom he has been pleased to confer privileges, with sacrilege, how much more sacrilegious boldness is it to condemn the prince's judgment of injustice? especially when it is not his sentiment alone, but also that of his great counsel and high consistory, and that not at one time (which might be imagined to be a stolen dint) but by such a continued series of consecutive acts that no cause can show the like; their very adversaries, viz. the Lords of Regalities *præsentibus, tacentibus, seu non contradicentibus, imo expresse consentientibus.* Though it be uncivil to inquire into the reasons of laws after they are made, and though a reason ought not to be sought for some old laws,‡ because it cannot be given, and would occasion much uncertainty if it were requisite, yet the laws whereupon the royal burghs found are none of these, but had very convincing reasons at the time of their enacting, (as the defenders seem not to decline;) and which reasons are still in force, as has been shown; as also they being *beneficia divina principis indulgentia proficiscentia,*

* *Quod in multitudinem dividitur, onus insensibile propemodum facit iis qui hoc sustinent. Novella* 38, *in principio.*

† *L.* 5 *C. de diversis rescriptis, L.* 3 *C. de crimine sacrilegii.*

‡ *L.* 20 *et* 21 *D. de legibus.*

quam latissime interpretari debent; l. pen. D. de constitutionibus principum. *2do*, As to the allegeance of desuetude, though it has made a great deal of bustling, and has seduced so many, that it is almost become a vulgar error, yet it has no weight; for *primo* the defenders can condescend upon no such acts as can validably infer a desuetude of the said privileges: but next, I positively affirm, that no desuetude can abrogate a law: and that this is *certissimi juris* in our neighbour nation of England, Craig, *Lib.* 1, *Dieg.* 8, *page* 38*th*, tells; who in the following page most solidly proves that no contrary consuetude (*ergo multo minus* a desuetude) is able to repel a written law with us; for says he most elegantly, such a contrary observance ought rather to be called *vetustas erroris* than *consuetudo:* and truly this is no more than what the Emperor Constantine had written to Proculus of before, in *l.* 2 *C. Quæ sit longa consuetudo: Consuetudinis ususve longævi non vilis authoritas est, verum non usque adeo tui valitura momento ut aut rationem vincat aut legem.* As for the contrary laws adduced by the defenders, especially *l.* 32. *D. de Legibus, Senatus-consultis, et Longa consuetudine*, which seem to prove a law may be annulled by contrary custom, they be true in laws made under a democracy, but not in the laws of a Prince, which in no sense or rational comprehension can be annulled or rescinded by any other power than that which made them; *ergo*, not by a contrary custom; which is also Doctor Taylor's opinion, *page* 743. The users of this argument would advert that by the same rule the nonconformists may plead the acts made against them and their conventicles to be null, as never having taken effect, as never having been observed, but that they in the contrary have continued their former use and practices. And yet how would he be exploded who would offer to argue in such a manner before your Grace, the great enemy of all such vermin? But if a scruple remain still in the minds of any, as if desuetude or a contrary consuetude were enough with us to repeal a law, I shall refer them to the narrative of the act pardoning penal statutes passed in the Parliament 1612, from which it appears sundry had flattered themselves in that erroneous opinion, that these statutes having been so long neglected without any research, trial, or punishment, the same could noways be put in execution, as turned in desuetude: it is true the said *error communis*, because of the multitude of the delinquents, according to that of the poet, *Quicquid multis peccatur multum est*, * is declared to operate *condonationem et veniam præteritorum*, but it has no strength to introduce a law *pro futuris casibus regulandis.* It is true, in the case of the *Merchants of Edinburgh* against *Sir Walter Seaton*, who in 1664 was studying to revive that 24th act of Parliament made by King James in 1600, for sealing all cloth; it was alleged by the merchants, that the said act was become in desuetude, and so did not bind; but nothing followed upon that debate. *3tio*, As to the allegeance of prescription, the same is most impertinent from the defenders, who are only sorry that the Royal burghs should interrupt them so much in their encroachments. *4to*, As to the allegeance, that the final reasons of those laws and privileges whereon the pursuers found, are long ceased and expired; it is replied, first, that this is already demonstrated to be false, yea, *in anno* 1661, the burghs have a ratification of all their former privileges, though unprinted, yet it shows the sense of that time so late and so near to our own, and that they thought not the reason of that law expired: next, the axiom *Cessante causa finali legis, cessat et legis dispositio*, must be understood *cum grano*

* *Vide* Dury, 16th *January* 1626, *St. Bothans.*

salis; the cases whereof are learnedly opened by Doctor Taylor page 731, speaking anent the abrogation of human laws. *5to*, As to the allegeance, that the pursuers' laws and privileges owe their first birth to King James the third, and that none of the Princes since, with all their power, has been able to make them observed; this is so gross an anistoresie and mistake in our chronicle, that the defenders (who are known to be well versed in our antiquities,) cannot be ignorant of it; and, therefore, the assertion can bear no other construction than of a wilful clench, at least a transport of blind zeal, making them lessen all that might tend to the reputation of the royal burghs. If there be any thing sacred, ancient, or venerable, in the constitution of the policy of this kingdom, it is the erection of the burghs with the privileges now in question. In our oldest records of written law, viz. the Books of Regiam Majestatem, and Quoniam Attachiamenta, (if that be our law which they contain, whereof Craig doubteth,) we have mention of them. In the Burgh Laws, cap. 18, 22,40, 134, 139, and 140, it is clear that wool, hydes, and other commodities, can only be bought and sold by burgesses; that stallangers, cremars, or dustifuts, in French *Pieds poudreux*, now called chapmen, had no freedom within burgh, except on market days, and for which also they behoved to pay. In the old tractat called The Chamberlaine air, *cap. ultimo Nis. 35 et 68*, amongst the articles of dittay to be inquired into, this is one: If any *man not having* the liberty of burgh usurp the same to the hurt of the burgh, and if cremars commonly buy and sell within burgh as burgesses, and by whose permission. Amongst the statutes of King William, cap. 35, 36, and 37, there is strict prohibition that none meddle in merchandise, save the merchants residing in burghs; and King David, in his statutes, cap. 32 and 33, ratifies expressly the haill liberties and privileges of the burghs, and wills them to enjoy the same as they were in use to do the time of good peace, and that none presume to oppress them, under the pain of being reputed breakers of the King's peace. If the defenders shall seek to palliate their oversight, by alleging, that James the third was the first of all the Jameses that did any thing in favours of the burghs, and that this was their meaning in the preceding assertion; not even this will they be able to make good: yea, on the contrary, King James the First, in his third Parliament 1425, act 38, declares the *minimum quod sic* of every merchant,* *viz. that he* have three serplaiths of cloth or the value; *ergo*, in his time there was not a promiscuous liberty of trade to all. Again, James the Second, in his eleventh Parliament, 46th act, declares what shall be the manner and constitution of the secret councils of burghs; and *in anno* 1457, acts 67 and 68, (this 68th act is only made by the clergy, barons, and King, against the burghs,) they provide again that those who sail in merchandise furth of the realm, be able men, of good fame, be freemen of burghs, and indwellers within the same. Could any thing have been more plainly expressed than this? and yet it must be affirmed by our adversaries that the burghs' privileges are but of yesterday, and of King James the Third's coining, as if he, inclining to tyranny, had not weighed the public good when he did grant them. *6to*, As for the allegeance, that the laws whereupon the pursuers found, are contrary to the public utility, the same needs no reply, it having been abundantly refuted already.

As for the pretence that the power of exporting and importing is no-where in the acts of Parliament adduced, *disertis verbis* given to the pursuers, the same is

* See also a privilege granted to merchants by James the first in 1425; (it is unprinted:) and the 117th amongst those printed in Gothic letter.

ridiculous, because 1*mo*, The express and sole power of retailing is given them, which is a far greater privilege than those under debate, *et majus continet sub se minus*. 2*do*, Our ancestors in those days were not curious in their words, as we are now, yet nothing can be better expressed by the equivalent than these two are in the act 1466, "Let none sail or pass in merchandice furth of the realm, but freemen burgesses dwelling within burgh;" there is export: "Let none, save freemen, buy foreign commodities to bring home, except gentlemen or others who may buy things needful for their proper use;" there you have import. Let none hereafter bewray so much ignorance as to assert export and import cannot be found in the acts of Parliament. Neither is the jibe altogether so witty which the defenders throw upon the simplicity of those times wherein they untruly allege thir privileges were first conferred, viz. that by act of Parliament all sailing was then prohibited from St. Jude's and St. Simon's day, till Candlemas, that is, from the middle of October till the beginning of February. Is not this the reigning malignity of the age? Has it not infected all persons of whatsoever degree, who think they cannot raise their own glory unless they throw dirt upon the tombs of their departed ancestors? Must all the wise and glorious actings of former ages be thurst down, to usher in the transactions of this time into their place, as if nothing were worthy to be upon record save that wherein we can plead a share ourselves? Shall not we be justly served by our posterity, who shall deride all our laws (which we extol so much in comparison of those that were before,) as insipid and physonless if considered to theirs? Why shall Scotland be condemned for making such a law, when it was an universal practice over the whole northern world, where the seas were boisterous, and the use of the compass or mariner's needle first discovered in Italy was not then well known?* Shall the apostle Paul's advice be mocked at, because in the account he gives us† of his navigation from Judea to Rome, he tells us the winter was come, sailing was dangerous, and therefore his advice was they should take up their winter quarters at the fair havens, which (hoping to gain Phœnice in Crete, and there to winter,) they neglected? This rashness would have stood them all their lives, had not Paul obtained them of God. Interpreters on the place tell us, no mariners used then to sail by the space of four months in winter, though it was in a Mediterranean and inland sea. Neither is the common law silent here; for the Emperors Gratian, Valentinian, and Theodosius, by their *constitut. in L. 3. C. de Naufragiis, lib. xi.* declare that sailing shall only be reputed legal and necessary that is undertaken between the calends of April and the calends of October.

This much by the way, in vindication of that act of Parliament; which, if rightly considered, will not be found altogether so ridiculous, distinguishing always the times. I shall now proceed to the act of Annexation in 1587, whereon thir defenders seem to lay great weight. Whereto it is replied, 1*mo*, That clause makes nothing for the burghs of regality or barony; seeing *ponendi semper sunt termini habiles, et verba improprianda, quando alias sensus absurdus vel juri contrarius ex iis resultaret;* and so it is to be only understood of such as had obtained themselves erected in burghs regal; of which kind we have many in Scotland, as Glasgow, Dumfermling, Kirkcaldy, Dysert, Arbroth, &c. 2*do*, *Esto*, it were to be understood of burghs of regality which never came to be royal burghs, the said act gives them no liberty of trade, but allenarly declares what privileges they were in use and pos-

* *Vide l.* 6. *C. De officio rectoris provinciæ.* † xxvii. chapter of the Acts, verses 9, 10, 11, and 12.

session of before they shall retain the same unprejudiced by this annexation: lest any should have fondly thought that the spiritual and temporal power of the Prelates and Abbots who had endowed them with such privileges being suppressed and abolished, the liberties themselves should also have ceased with the power; and so that it is only of the nature of an *Interdictum uti possidetis.* 3tio, Can an obscure clause, cast in by the bye, in a long act consisting of many members, preponder such a continued series of laws as the pursuers' privileges are asserted by, all which acts treat directly of our purpose and nothing else? As for the pretence that his Majesty is the sole disposer of trade, by act of Parliament in 1663, and that he has given all these privileges to burghs of regalities, and wherein also they stand infeft; it is REPLIED, 1*mo*, The defenders strain the act 1663 beyond its just meaning, the design of that act being only to empower his Majesty to restrain the importing of foreign commodities, or to lay such customs and impositions thereon as pleases him, or may be equivalent to a restraint. And upon this foundation Sir Walter Seaton and others, who even at that time designed for a monoply of the salt, they procured an imposition of L.12 upon every boll of foreign salt to be imposed by his Majesty, who had got a general power so to do by the foresaid act; and it is well known that act was only designed to be a colour to that horrid and dangerous monopoly; and therefore is impertinently wrested to the case now in hand. 2*do*, Any grants the burghs of regality have got, the same are null, *proceeding a non habente potestatem;* his Majesty being denuded of all these privileges of before, in favours of the royal burghs: they are but private deeds sinistrously impetrated to the prejudice of a third party; they have no force against an act of Parliament; they are granted *parte non citata*, and so *salvo jure;* they are null, not being granted in plain and open Parliament, as our laws most wisely require; and therefore they can never plead a like privilege with the pursuers, as if both derived their rights from one common author. (Act 43, in 1455.)

As for the defenders' grievances and inconveniences which they zealously aggravate, viz. that some burghs have freedom which are of no use to the country; others want that freedom, which if they had, might be improven to great advantage; that some unfree men are debarred from merchandizing, who yet understand more solidly the principles of trade than a whole town does, &c. To which it is REPLIED, That these inconveniences are so easily salved and remedied, that it is wondered the defenders are not ashamed to urge them so vehemently. That burgh of barony or regality that for situation or otherwise may serve the lieges most commodiously, upon representation may procure themselves erected by his Majesty, with the privileges of a burgh royal; whatever person would better himself or his country, by communicating and exercising his skill in the way of trade, upon address to the magistrates of what burgh royal he please, he may get himself incorporated and made a burgess.

The slight the defenders make use of, to cause this pursuit to pass for unfavourable and odious, is false, viz. that since the institution of the Session, the royal burghs could never obtain a declarator upon their privileges before the Lords; I say, to speak charitably of it, it is false; for Balfour, in the title of Burrows, folio 9, sets down a number of sentences recovered *in foro contentiosissimo* at the town of Edinburgh's instance against Leith; as also at the instance of other free burghs against unfree-men; in which it is expressly decided, that the king may not give power or licence to any of his leiges, unfree-men, to buy any kind of merchandize or staple goods, or to sell the same, within the liberties of any free burgh;

and if his Highness give any such licences, the Lords will annul and discharge the same, because the same be given in hurt and prejudice of the burghs, in contrary the commonweil and laws of this realm; and this was found on the *2d of July*, 1550, betwixt the *town of Edinburgh* and one *David Rowan*. *Item*, No inhabitant of the town of Leith, or other unfree-man, must pack or peill within Leith or other unfree places, but must bring the same to Edinburgh, the principal staple thereof, where they must be bought from freemen and no others; as was decided by the Lords on the *17th of June*, 1558, betwixt the *towns of Edinburgh* and *Leith*: with many other of the like nature. Though these be sufficient to convict their assertion of levity, yet lest they vilipend these as old, I will furnish them with fresher. Durie, at the *4th of February*, 1630, tells us the Lords found *the town of Edinburgh's* letters orderly proceeded against *Leith*; whereby they were discharged to tap or sell wine in small. For all that time there was no more claimed or controverted betwixt the free and the unfree burghs, till now that the foundations of all law are violented and shaken. And yet it was then alleged for Leith, as is now alleged for thir defenders, that the royal burghs' privileges were gone in desuetude; a contrary consuetude had succeeded; that they were contrary to the common weil, &c. all which was repelled; and this they did before the act in 1663 was made.

I might adduce many more instances, but I shall refrain, lest it nauseate your Lordships.

Where the defenders allege that the tyranny of the free burghs over the unfree ones, was the fruitful mother by whom the regal burghs did multiply, (each striving to erect themselves, that so they might be free of that oppression,) the great part of which brood are again studying an escape from thraldom and poverty, though it should be by showing their mother's belly: the representation (I say,) is calumnious and off the road; for it is well known, that the true incentive moving many unfree burghs to obtain erections in burghs regal, was to put themselves under a covert from the cruel and barbarous oppression of the nobility and neighbouring gentry, whereunder the country then groaned, and I fear is not well freed of it yet. And this is the only true cause of their desire to be erected, and their present desire to be disjoined.

As for the last overture proposed by the defenders, viz. that this cause may be taken into the Parliament, I shall say only two things; the first is, the royal burghs will never decline the sentiment of a court where their cause has been so oft and so favourably judged already; but next seeing no clearer act can be drawn up in Parliament in this affair than what we have already, I humbly conceive the Lords should never decline their own authority, nor put it in the hands of any other. This (sure I am,) can never displease your Lordships, for it is spoke in maintenance of your jurisdiction, and in so doing, ye become all my clients; and who then shall doubt of the event of the cause?

My Lord, you have seen how weak and how ruinous the defenders' grounds have proven, however they were exactly fashioned to the modern rules of art. The royal burghs beg your Grace's patience only to one word, and so they shall have done. It is in your Grace's power to-day to vindicate the wounded honour of our venerable acts of Parliament. Are they not prostrate at your Grace's feet, craving your justice against those sacrilegious defenders, who, pleading for they know not what, natural liberty, have most unnaturally leapt over all bars

both civil and religious? Do not think it a light matter to rob the royal burghs of their privileges and birth-right, which are become their property by as good a title as any of you brook your lands and estates. By what hand ye shall communicate thir liberties now called in question, to the defenders, by that same shall ye lop off the burghs from being the third estate of the kingdom. Remember that a threefold cord ought not to be easily broken; consider what lamentable confusion may follow upon the loosing of one pin of the Government; that the touching such a sacred fundamental constitution may unhinge the whole; that Government is like to a sheaf of arrows fast bound,—pull out one, all will follow and fall to the ground; and how terribly dangerous such an innovation may be. Let not the burghs' complaints be heard, that a tribe has this day failed from amongst us; give them not cause to say of you what the Israelites said of their Egyptian tax-masters, that brick is required of them as formerly, and yet straw is withdrawn from them. Your Lordships know that though changes tickle the fancy and please our appetite, yet all who have written the doctrine of politics tell us *quod omnis mutatio etiam in melius est periculosa;* that it proves ofttimes safer to continue an inconvenient custom, than to introduce a new one though better; that *in rebus novis constituendis, evidens debet esse utilitas, antequam recedatur ab eo jure quod diu æquum visum est;* that Plato avows there ought to be no mutation *a bono ad melius,* but only *a malo ad bonum;* that old customs,* like long lived men, are presumed to have arrived at that age through their sound and equable temperament and constitution; and therefore let the royal burghs enjoy their privileges as they have done hitherto; let them receive no dash nor innovation from you, lest posterity (who will assume the freedom which would be reputed criminal in us,) relate your consulship and government in the number of the unlucky and unfortunate days.† Be pleased to consider what manner of defenders we have to do with. Is it not the Lords of the regalities? I shall spare to tell your Lordships what for a severe eye his Majesty's most royal predecessors the Kings of Scotland has ever had over regalities, truly valuing the granting of them as the giving away of so many precious and irreparable jewels and diamonds out of their crowns.

I shall spare to rip up the sentiments of our Parliaments from time to time anent regalities.

By the 43d act of Parliament in 1455,‡ all regalities that then were in the king's hands are ordained to be annexed to the royalty, and that in time to come, no regalities should be granted without deliverance of Parliament; (by which test if the most part of our regalities were tried, they would be infallibly found null;) and the very next act of that Parliament discharges all heritable offices, (of which sort regalities are,) and revokes all such offices given in fee since the decease of King James the First. Has it not been the great inconvenients following by them that has extorted these acts from the Parliament? yet stay a little and we shall see more. Because thir regalities were claiming to privileges prejudicial and burdensome to the country, therefore by act of Parliament in 1457, (it is the 73d act,) they are restricted to their privileges and freedoms as they are found due; with certification, if any having regal, abuse it in prejudice of the king's laws and breaking of the country, (all which presupposes horrid abuses, seeing *ex facto oritur jus, et ex malis moribus bonæ nascuntur leges,*) they shall be punished by the king

* See Maximus Tyrius, *sermone* 23. † Dies nefasti et atri. ‡ *Vide* 20th act, in 1449.

and the law as effeirs. *Item*, in all the revocations of our King's regalities, are always one thing: *vide* act 51 in 1493, and all the rest of the revocations; *vide* act 46, in *March* 1649. Again in the 277th act, granting a taxation to King James of 200,000 merks in 1597, the regalities are stigmatised as defrauding his Majesty of the taxation due to be paid by the inhabitants of the said regalities, who being put to the horn commonly obtain simulate dispositions of the same from the lord of the regality, having right to their said escheat, to the intolerable prejudice of his majesty's collector. Your Lordships know better than I, that the free princes of Germany at the beginning got their lands erected to them by the Emperors, with some such like privileges as those of our regalities are; which princes now have wrested sundry of the most important and most incommunicable badges of royalty and sovereignty from him, and come to that pass, they pay him little or no recognizance, if any. Are not the lords of the regalities to this day contending with his majesty, (so that it is not much to be wondered to see them unjustly vex the royal burghs,) which of them shall have the casualties of bastardrie, and last heir of those who die within their resort. And though their vast and boundless appetite is to be suspected, yet I must beg pardon to say, that if all the regalities in Scotland were founded in as much merit and incomparable deservings as that which your Grace has got erected, either their disconformity to that standard would make them fewer, and so ease the country of them, or their conformity would allay much of that grudge and prejudice the lieges have against them.

In respect of all which, &c.

The Lords the time of this debate, forced the royal burghs to declare that it shall be leasum and lawful to gentlemen and all others, whether free or unfree, to export and send abroad their corns, cows, linen cloth, plaiding, or other product and manufactory of the country, without owning the burghs; or at their pleasure to sell them to unfreemen within the kingdom, who shall have likewise power to export them: providing always the gentlemen, their servants, or the unfreemen to whom they sold their commodities and who export them, bring home, and import nothing therefore, but either money, or else so many foreign commodities as shall be needful for their own use.

This was the more easily condescended to, because the import (which is three times more considerable than the export,) being secured, the prejudice and hazard was the less, seeing all export is *intuitu* of the import. Next, the unfreemen get no more by this concession, than what by the very acts introduced in favours of the royal burghs is reserved to them. See act 11 in 1466; and the 152d act in 1592. As this question was unhappily started at a wrong time by the burghs royal, so it gave rise and opportunity to the act of Parliament in 1672, voiding the case against them. *Advocates' MS. No. 353, folio 138.*

1672. *June* 25. NASMYTH and FORREST *against* ALEXANDER HAMILTON of Dalzell.

THIR two persons convening the laird of Dalzell as heir to his father, for making payment to them of L.32 which they paid for his father in 1653, when they

were tenants of the lands of Allantonhauch, the same being exacted from them for the cess due forth of these lands: it was ALLEGED, That the defender was noways liable in that debt, because he had an elder brother, viz. Robert Hamilton of Monkland, who was heir general or heir of line to his father, and so behoved both to be convened and discussed before any heir of conquest, provision, or of the second marriage, such as this defender is.

To which it was REPLIED,—That though *regulariter*, the heir of line must be first discussed, yet there was no necessity of using that order of discussing here, because this defender succeeding as heir to the very lands wherefore this cess was paid, and upon account whereof this debt was contracted, and it being exacted then from the tenants as *debitum fundi*, it were but just they should have the same privilege in the repetition whereof, and be put to know none save the possessor of the land, especially he succeeding thereto as heir.

My Lord Craigie refused to sustain process against this defender, till the heir of line were first discussed, notwithstanding of all the specialities in the case; and called to mind, that in an action betwixt the Duke of Lennox and his sister, the Lords ordained the heir of line to be first discussed: albeit it was alleged, that the debt acclaimed was contracted upon the account of those lands to which the heir of provision (whom they were insisting against) had succeeded.

Advocates' MS. No. 354, folio 146.

1672. *June* 26. Anent WITNESSES' EXPENSES.

The Lords have laid down a certain rule for witnesses' expenses in all time coming, whether they be adduced in causes civil or criminal; viz. they have modified to each footman two groats *per diem*; and to every horseman four groats.

See in January 1679, in George Young's case. *Sneidivin, ad parag. 24 and 25, Institut. de actionibus, pag.* 1426.

Carolus quintus, Imperator, appoints *octo cruciferos* for a witness's expense *per diem.*

Advocates' MS. No. 355, folio 146.

1672. *July* 2. Anent REDUCTION EX CAPITE INHIBITIONIS.

Quæritur, if a man who pursues to have deeds reduced, *ex capite Inhibitionis*, or such like, be obliged to call in his process the granter of the said deeds, sought to be reduced, and he being dead, his representatives: seeing if the deeds be annulled, the granter stands bound in warrandice, and so is concerned that they be not reduced; and also he may be able to say many things against that creditor who pursues the reduction, that may be noways consistent in the defender's knowledge.

I think it safest the author be called, just as the principal debtor must be called

in an action to make forthcoming. But that is absolutely necessary in a forthcoming, yet I think it not so here.

Advocates' MS. No. 356, folio 146.

1672. *July* 2. Anent PROCURATORIES of RESIGNATION.

Quæritur, A father, by contract of marriage, dispones lands to his son, and the heirs of his body, and grants a procuratory of resignation, for infefting his son and the heirs therein: the son dies, and never any resignation made: he leaves a child behind him, which child is served heir to his father: the question is whether (the goodsire, granter of the procuratory of resignation, being still on life,) resignation may not be summarily made in favours of that child, as well as if by name and sirname he had been mentioned in the procuratory; seeing by an inquest of sworn men, he is cognosced and declared to be the son and heir of that man to whom and whose heirs the procuratory was granted.

Sir George Lockhart and sundry were of opinion, there needed no action, but that the service was equivalent to an assignation to the procuratory, in which case resignation might be made summarily.

Advocates' MS. No. 357, folio 146.

1672. *July* 5. JACOB JAMART *against* HARRY JOSSIE.

Jacob Jamart pursuing Harry Jossie, for sundry sums he had paid for him as cautioner: It was alleged for the defender, that by the police and practique of Bordeaux,* the major part of one's creditors (which goes either by the sums or the number,) having accepted a cession from their debtor of all his goods, they give him a supercedere and *rescriptum moratorium;* and what they do in this sort, binds all the rest, and they are obliged to stand to it, and the goods are divided amongst them all *pro rata;* that conform to this police, he had made a cession; and therefore craved, that according to the custom of Bordeaux, Jamart might make a proportional part of whatever he shall recover by virtue of this sentence forthcoming to his other creditors in Bordeaux, and that the Lords would divide it amongst them. The Lords would not regard the customs of another kingdom, nor decide conform thereto, (seeing they in the same manner rejected ours, and by acts of parliament we are ordained expressly to be governed by the king's laws, and not by the statutes and customs of any other realm;) and thought the desire of the defender was as unreasonable as if one should say, if a Frenchman had got a bond of a Scotsman, past twenty-one years, but within twenty-five, and did pur-

* And this was also the common law, *l.* 7. *in fine, l.* 8. 9. and 10. *D. de Pactis. Vide Schotanum, ad d. T. de Pactis,* who shows the customs of Germany and Holland have receded from this now. *Vide omnino l. ultimam C. Qui bonis cedere possunt. Contrarium definivit Senatus Burdegalensis ejus quod hic allegatur; ut videre licet apud Autumnum, in Censura sua Gallica ad l.* 8. *D. de Pactis.*

sue for the sum here in Scotland, the debtor had a good defence in alleging that the bond must be regulated by the law of France; that though he was major the time he granted it by our law, yet he was minor by the French law, (which following the footsteps of the civil law, holds a man for minor till he pass twenty-five;) and therefore he had revoked the same: would not all judge this absurd? and yet it is all one with what the defender alleges, only they left the defender's other creditors free to pursue Jamart, upon his return, according to their police in Bordeaux, and to evict their shares from him, conform to their law there; of which they could take no notice, the defender being a Scotsman, the subject of the debate being here also, and the same being pursued before a Scots judicatory.

Then the defender pressed, that Jamart might at least find caution, that what he should obtain of him here shall be furthcoming to all having interest, as shall be decerned by the consul and jurats of Bordeaux.

This was repelled, because the putting him to find such a caution were alike as to deny him justice, seeing none would bind for him, a stranger, in such a considerable sum. *2do*, He had land and vineyards there, so that none could doubt his responsality. *Possessores immobilium non tenentur satisdare; l.* 15 *D. Qui satisdare cogantur.* The Lords refused to put him to find caution.

Advocates' MS. No. 358, *folio* 146.

1672. *July* 5. The EARL of CALENDAR *against* The TOWN of STIRLING.

THE Earl of Calendar, as heritable Sheriff of Stirlingshire, pursues the Town of Stirling for making payment to him of those customs, commonly called the Sheriff-gloves, as also of a stag every day of the fair, conform to his possession, at least the use and wont of his authors, the Earls of Mar. ALLEGED,—That no right was produced to prove the Earl was Sheriff, or had right to the particulars acclaimed. ANSWERED, They had produced his infeftment of the Sheriffship, which, though it was general and bore not the particulars he sought, yet he offered him to prove those were immemorial casualties of that office.

ALLEGED,—His infeftment is null, proceeding upon a gift or signature of his Majesty's, the time of his captivity in the Isle of Wight, all which are since revoked and declared void. ANSWERED,—Whatever defect he had that way, the same is purged, being ratified in Parliament in 1662. REPLIED, *Quod non est, id nequit ratificari.*

Farther ALLEGED,—That Stirling is sheriff within itself, and so never owned the sheriff of the shire. ANSWERED, The two sheriffships are compatible; the sheriff of the shire is the far older of the two, and was in possession of the emoluments accruing to his office, and now acclaimed, before Stirling were made sheriffs within themselves: that the gift given to the town was *salvo jure antiquiore.*

ALLEGED,—That these thirty years bypast, the sheriff of the shire has used no deeds of possession of what he now seeks; that the town all that time has been free and in possession of their own privilege of sheriffship; and, therefore, the action being possessory, the defenders are to be maintained in their possession

and must have the benefit of a possessory judgment. ANSWERED, There is no immunity prescribed, except they say forty years free.

It was likewise ALLEGED,—That the acts of Parliament discharge all sheriffs from oppressing the lieges in fairs; viz. acts 60 and 61 *in anno* 1456, act 33 in 1469, with many others. Vide act 277, post medium, in 1597; act 125, P. 1581. *Item*, that it is *res judicata* already betwixt the Town and this pursuer's authors, in so far as they having been pursued by the Earl of Mar for thir very customs, they were after debate assoilyied therefrom. ANSWERED, That *res judicata* being *exceptio impeditiva litis ingressus*, and so in effect a dilator; the same must be instantly verified by production of the said sentence *absolvitor*, else no respect ought to be had thereto. *Vide Dury*, 10*th July*, 1623, *Cronnar of Arran* against *Laird of Skelmurly*.

Advocates' MS. No. 359, *folio* 147.

1672. *June* 15, and *July* 6.

June 15.—A DONATOR to the ward and marriage of a subvassal pursuing for the ward of the lands of ——, who had obtained them in feu from the subvassal, who held the whole ward of a subject superior. Against which pursuit it was ALLEGED, That his lands did not ward, because having obtained a lawful feu thereof, conform to the 72d act of Parliament in 1457, all that could belong to the donatar was allenarly his feu duty which he owes to his superior; the donatar being now come in his place. *Vide* act 90 in 1503; act 116 in 1640.

To this it was REPLIED,—That this feu being set since the 12th act of Parliament in 1606, the solemnities prescribed by that act ought to have been observed. *Vide infra, No.* 360, [6*th July*, 1672.]

DUPLIED,—His feu is set conform to the tenor of the said act, for he has obtained the confirmation and consent of his superior's superior; and, therefore, his mediate superior, nor any deriving right from him, can never quarrel the feu, nor claim more by their immediate vassals' warding than the feu-duty contained in his charter, and which charter the superior has confirmed.

TRIPLIED,—*Esto*, The superior has confirmed the said feu charter, that can import no renunciation or discharge of the ward of these lands, when the superior thereof falls in ward; but all that the superior designs to quit thereby is only the benefit and casualty of recognition. And that Hope tells this to have been the Lords' opinion, where the king confirms a feu set by his ward vassal to a subvassal: that confirmation saves from recognition, but not from ward; *ergo idem dicendum*, where another superior from the king consents to a feu set by a vassal holding ward of him. See Hope, Tit. of Ward and Releiff, in *fine; Lord Cathcart* against *his vassals*, folio 93.

To which it was QUADRUPLIED,—That the case of the king and of other superiors differed, which is clear from the said act in 1606, though now both their rights are made equal and levelled by the 16th act of Parliament in 1633. That a subject superior, by receiving and infefting his vassal, quits all preceding feu-duties, if any be owing. *Ergo*, By confirming his subvassal's feu charters, he

reserves nothing when the lands shall return to him through reason of ward, but allenarly the feu-duty. *Hoc eget decisione imperatoria*, and would put the lieges to much certainty, who, generally, when they get pieces of ward lands feued to them by the vassals holding them ward, and obtain the same confirmed by their author's superior, they think themselves fully secured against all dangers and inconvenients whatsoever; whereas it would be of lamentable consequence, if such deeds were found not to free from ward, but allenarly from recognition.

See the 58th act of Parliament in 1661; Craig, *de feudis, pagina* 110, *lib.* 1, *diegesi ult.* See Dury, 9*th March*, 1639, *Lord Almond. Vide infra, No.* 344, [22*d June*, 1672.]

It were a thing of infinite advantage to this kingdom if all ward holdings were utterly suppressed; and truly, in England, upon the grant of the chimly money, the king has remitted all the casualties of ward to his vassals there; and it would be more in the superior's way to have a constant yearly retoured duty paid to them, whether king or subject, according to their respective rights, furth of all the land in Scotland, than to wait upon the uncertain casualties of ward, liferent escheats, and the like: it would take away much confusion, abridge our laws, cut off a thousand intricate and fraudulent contrivances introduced by the feudal customs, and reduce us to that ease that we should not need the half of the evidents we now have: and though it would induce a seemingly horrid innovation on the face of our law at first, yet it would make it infinitely more amiable, more perspicuous, and more plain, after it had become once customary to us. See Craig, *ubi supra*, anent the king's annexed patrimony.

Advocates' MS. No. 339, *folio* 134.

1672. *July* 6.—In the debate marked *supra* at No. 339; if a confirmation of ward lands given forth in feu, salved from ward, or if it was only a discharge from recognition; the Lords found such a confirmation to liberate from all wards and other casualties whatsoever that follow the nature of ward-holdings.

I hear some very good lawyers doubting whether those lands which held formerly ward of his Majesty, and now are changed to taxed ward or feu, by virtue of the commission and power given by the act of Parliament in 1661, of which there are a great number, are well secured in their change; and if the said alteration may not be questioned hereafter, or annulled and revoked, upon this ground in law, that some acts of Parliament seem to insinuate, that ward holdings are a part of the patrimony annexed to the crown, and therefore cannot be changed in diminution of the king's rental, without a lawful dissolution had preceded in Parliament, and done upon special knowledge that the same is for his Majesty's seen profit and utility.

They say this was alleged in Cranburne's recognition: but President Gilmoor, in regard of the change of his own lands of Craigmillar, first to blench and then to feu, was hugely displeased with it; and alleged those ward-holdings spoke of in the act of Parliament as annexed to the crown, behoved to be understood only of certain lands formerly holden ward of his Majesty, and the property whereof was returned to him by reason of forefaulture or otherways, and which were declared to be of the annexed property. Yet I think the superiority

of ward holdings as they stand in his majesty's person, they are a part of his property, and may be meant in that act.

Advocates' MS. No. 360, folio 147.

1672. *July.* JACK *against* JACK.

IN an action, Jack against Jack, a father having given a moderate bond of provision to his three younger children, the same was quarrelled upon this ground, that it was subscribed by two notaries, only before three witnesses.

The Lords found the bond null. And when the parties were content to restrict it to L.100, for which one notary and two witnesses were sufficient; the Lords refused the same, because they found it wholly null, *et quod contra legem seu formam juris fit ipso jure nullum est.*

This seems contrary to their very frequent practice, by which they ever allowed restriction to the sum of L.100, conform to that axiom of the law, *utile per inutile non vitiatur.* See Dury, 19 *December* 1629, *Elliot* against *Morton*, where the Lords resolve in all time coming to permit the parties to retrench their bonds. *Vide infra, No.* 398, [*Deans, June* 1673.] This decision agrees with the French arreists; *Mornacius in observationibus ad l.* 29 *D. de legibus, Quia salvis legis verbis ejus mentem circumvenire non licet.* See Mornacius also *ad l.* 38 *D. de pactis.* *Advocates' MS. No. 362, folio* 148.

1672. *July.* ESSINTULY *against* ——.

ABOUT this time, in a reduction raised by Essintuly against ——, the Lords found, that a man having granted bond, and paid a part of the sum, if the creditor thereafter assign the whole bond to a third party, who charges for the whole, and gets out caption and takes the debtor, who, though he had paid a good part of the sum to the cedent, yet through necessity, and to relieve himself out of the messenger's hands, gives a bond of corroboration for the whole, as well that which he had paid, as that which was yet resting. The Lords would not reduce the said bond of corroboration, upon this reason, that though he had corroborated the whole, yet truly there was but such a sum resting, and the remainder was paid to the cedent, as his discharges thereof confess: which they would not receive now, because, by his giving the bond he had renounced any defence or allegeance he could found upon these discharges; that he had voluntarily prejudged himself; that the force and fear he was under when he gave the bond, was legal and just, and so could never annul the bond. And this they found, notwithstanding they alleged, that a bond of corroboration was given in farther security, and not to innovate the first bond; and, therefore, whatever may be objected against the first, may also be objected against the bond of corroboration; now the discharges would have undoubtedly defalked the first

bond *pro tanto*. As it was not *metus injustus seu illicitus*; so *ex l.* 13, *p.* 1*mo*, *D. de Injuriis, Executio juris non habet injuriam*. *Vide supra, No.* 337, [*Macintosh* against *Spalding*, 13*th June*, 1672.] *Petrus Peckius de jure sistendi, capite* 43. *Vide* 27*th July*, 1678. *Advocates' MS. No.* 363, *folio* 148.

1672. *July* 10.

ONE convening the fourth son of his debtor, to pay him a sum owing to him by his father, it was ALLEGED, That no process could be sustained against him, because he was not heir, nor could he be heir. REPLIED, That he had got a patrimony from his father, and so ought to pay this debt *in quantum lucratus est*. DUPLIED, That passive title was never heard of; 2*do*, *Esto*, he were heir of provision, the heirs of line behoved to be discussed ere any process could be got against him. TRIPLIED, He needed not discuss the three elder brothers here, because they were all bankrupts. They were to have the Lords' answer on it.

The Lords refused process with indignation.

Advocates' MS. No. 364, *folio* 148.

1672. *July* 10. Anent CAUTIONRY.

IN the same action it came to be questioned, where a man is inserted in the body of a writ, and designed cautioner, and subscribes only witness; if that writ will bind him as cautioner. It is thought, albeit he has not designed to become caution, yet, in regard he should read the paper whereto he is desired to subscribe as witness, the subscription will bind upon him as cautioner. Yet this seems hard. *Vide infra, No.* 394, [*Rae* against *Glasse*, *June*, 1673.]

Advocates' MS. No. 365, *folio* 148.

1672. *July* 11. SIR WILLIAM FLEMING *against* ZAIR.

Sir WILLIAM FLEMING, Commissary of Glasgow, pursued a declarator against one Zair, his clerk, to hear and see it found and declared, that by the instructions given to the commissaries *in anno* 1666, the profits of all summons, sentences, transumpts, registrations, confirmations of the seal and signet, and all other such benefit, shall be divided thus, two parts to the commissaries, and one third part to the clerk.

The Lords declared conform to the instructions.

Which decision has awakened the commissaries of Edinburgh to fly to and get

the like; and they imagine it will be 1000 merks a year in their ways, because at present their clerk gets more than they get all.

Advocates' MS. No. 366, folio 148.

1672. *June* 26, and *July* 11. ELIZABETH LUNDY *against* The EXECUTORS of LUNDY of Spitle.

June 26, 1672.—LUNDY of Stratharly, marries his sister upon Lundy of Spitle: in the contract of marriage there is a clause, that in case the woman dies without heirs of the marriage, then, and in that case, L.2000 paid by her brother for her in name of tocher, shall return again to her brother, his heirs and assignees, or else the equal half of the moveables it shall happen him and her (viz. the two married persons) to have the time of her decease. The woman dies without children of the marriage, whereupon Stratharly, having long ago paid the tocher, assigns the contract to Elizabeth Lundie his daughter, who pursues a declarator, that the case wherein it was provided and agreed that the tocher should return, has existed, and therefore concludes repayment and repetition of the tocher.

Against which it was ALLEGED, that, by the contract, there was something more required to make the tocher return to the wife's brother beside her dying without issue, viz. that her husband outlive her; so that there are in effect two conditions annexed to the provision anent the returning of the tocher: 1*mo*, That there be no children; 2*do*, That she die before her husband. Though the first existed, the second did not; but, to the contrary, she survived her husband many years. And that this is the whole scope of the contract, the true interest of the parties, and the real meaning of these words in the last clause anent the half of the moveables: and to interpret it otherwise were neither just nor equal; for what could be more contrary to sense or reason than for a woman to brook and liferent her husband's whole estate, and yet his executors to be liable in refusion of the tocher? does not this choke that rule of natural equity, *Qui habet incommodum debet et habere commodum?* See the debate more fully in the informations.

The Lords found, that the tocher was not to return *in eum solum casum*, whereby the wife should die without issue, but also *in casum* that she died before her husband: which not existing by the parties' meaning, (as the Lords explained it,) repetition ceased, and therefore the defenders were assoilyied.

A man who considers the cause narrowly, would think it very clearly favouring the pursuit, and the allegeances on the contrary to be in comparison only *leves vanæ et inanes conjecturæ:* but *standum est judicio dominorum*, who have thought otherways. *Vide supra, No.* 321. *in fine,* [*Laird of Balnamoon against Macintosh, 9th February* 1672.] *Advocates' MS. No.* 351, *folio* 136.

1672. *July* 11.—In the action, marked *supra*, betwixt Hamilton and Lundie, at the No. 351, the pursuer having produced a letter under the said Lundie of Spitle his hand, whereby, according to the agreement contained in the contract

of marriage, he declares the tocher shall be repaid, if there exist no bairns of the marriage; the Lords, upon this, found his intention has been to pay back the tocher in that sole case of not existence of children, and therefore sustained the declarator. *Advocates' MS. No.* 367, *folio* 148.

1672. *July.* MARGARET GRAY and DAVID SCOT her Spouse, *against* JOHN GRAY and his CREDITORS.

ABOUT the same time, in a reduction, pursued at the instance of Margaret Gray and David Scot her spouse, against John Gray, father to the said Margaret, and the said John his creditors, the following case happened: Michell Gibsone disponed some tenements of lands to Catharine Gibsone his daughter, and to Jo. Gray her husband, his son-in-law, in liferent, and to the bairns of the marriage procreated betwixt them; which failyieing, to the said Jo. Gray the husband, his heirs and assignees. Catharine dies, leaving only one daughter behind her, called Margaret Gray; who is taken away while she is scarce twelve years old, by David Scot, servant to Walter Pringle, advocate, and married on him without her father's consent; who immediately serves his wife heir, in the foresaid tenements, to her goodsire Michell Gibsone, and intents a reduction of the disposition made to the father, as done *in lecto*.

Against which it was ALLEGED, that such actions are only competent to the heir of the granter, and that only when they are to his prejudice; but *ita est*, this pursuer, the time of the granting the disposition quarrelled, was neither heir nor apparent heir to her goodsire the disponer, her mother being on life; neither was the deed to the heir's prejudice, but rather in her favours, it reserving her liferent thereof; neither did ever the heir quarrel it, or show any dissatisfaction at it either by word or writ, in her lifetime.

The Lords FOUND the pursuer had interest to reduce, albeit she was neither heir nor apparent heir the time of the granting the said right, but immediate heir by progress. As also the reason being proven, they did reduce the disposition in so far as by the termination the father was constituted fiar; but sustained it *quoad* his liferent, because *in omni eventu* he would have had right to that; for *esto* there had not been a disposition, but he had served his wife heir to her father in these tenements, he would then have had right to the liferent by the courtesy of Scotland, she being heretrix. See the information beside me. *Vide supra*, 11*th December*, 1669, *Shaw and Handyside* against *Calderwood*.

Advocates' MS. No. 369, *folio* 149.

1672. *July.* GEORGE SUITTY *against* ROBERT BELL.

IN the same month of July 1672, in an action pursued before the Bailies of Edinburgh, by George Suitty against Robert Bell, (but which was truly managed

by Robert Burnet against him,) for removing from a writing chamber, conform to a warning forty days before Whitsunday, by chalking the doors, as use is within burgh: it was ALLEGED for the defender, 1*mo*, No process, because the pursuer is not sufficiently authorised to pursue; in so far as George Suity, merchant, the alleged tutor, with whose concourse this action is intented, has given no warrant, and declares he knows nothing of it. 2*do*, *Esto* he did own it, his concourse is not sufficient, because it is offered to be proven the pursuer is past his years of pupillarity, and so ought to choose curators. 3*tio*, *Esto* he had curators, the warning is null, because it is offered to be proven by the said tutor his oath, that he never gave warrant for warning of him; without which, or a warning from one having power, the defender is not obliged to remove.

To which it was ANSWERED, for the first and second, he will choose his procurator *curator* to him *ad hanc litem*. And which the bailies sustained *eo ordine*. To the third, the pursuer condescends upon William Shaw, by whose warrant the warning was used, and who had power so to do as factor, and who used to set the chamber and uplift the mail. This answer the bailies found relevant.

Whereupon we were put to reply, 1*mo*, That a factor has only power to lift rents, but no power to warn tenants, except it be expressly given him. 2*do*, Any warning used by William Shaw's direction ought not to be regarded, because passed from, in so far as, after the same, he declared he was satisfied the defender should stay and continue his possession; and, in regard he had taken arles from Robert Burnet, as having set the chamber to him, he went, forty days preceding Whitsunday, *rebus integris*, and offered the same back again, upon all which instruments were taken: and it is certain, any indirect act interpreting the master's, or those having his commission, their will, that the possessor warned sit still, infers tacit relocation, and imports a discharge of the warning; tacit relocation being inferred from deeds oft times containing no such express declaration of the master's will as this alleged one does; *nam dispositum in uno ex correlativis debet et obtinere in altero, cum eorum eadem sit natura*. And as by an immemorial custom within this burgh, it has been permitted to tenants, who have taken houses any time before law-sunday, to give them over without any hazard; so, beyond all controversy, in common justice and equity, this privilege ought to be equal to the master as well as the tenant.

It came to no decision. But I find Sir George Lockhart and others positive that there is no such custom: at least *nunquam fuit judicio contradictorio vallata;* but suppose it had been so, that it was irregular and dissonant to the principles of law, by which, after I have taken a house and given arles thereupon, I have made a perfect, complete, and consummate bargain, and from which neither party can resile except by consent, there being no more *locus pœnitentiæ*. If it be objected that tacks, and such like contracts and agreements, are not perfect till writ intervene thereupon, and the same be delivered, and, till then, either party may repent; I answer, that is indeed true; yet a verbal tack, entered into without any solemnity of writ, is sufficient and obligatory for a year amongst the parties, and they will not be permitted to resile therefrom during that space. And though this be justly called in question, yet it is a rooted opinion of a long time that tenants may do it; and it has been oft practised, though never drawn in dispute, at least has never found a decision, and therefore would, I think, assoilyie any who use it, till by a law, or a solemn decision, it were found.

unlawful, and which ought only to regulate *pro futuro*. *Vide supra, No.* 284. [*Duff against Forbes, 5th December*, 1671.] But the other must be much more dubious, if a landlord may give over his tenant, it having been less practised, and scarce laid claim to by any; yet, if the first stood on solid foundations, the same parity of reason would also seem to militate here; for, why should the master be in a worse condition than the tenant? Why should the law be more a step-mother to him, she being equally confident and indulgent of all who stand *in pari casu?*

In this action it fell incidentally to be talked, if a pursuer, finding himself delayed or otherwise lesed and injured in an inferior court, might advocate his cause to the Lords, as well as a defender. I never saw any of them attempted, and I think them scarce regular: for a pursuer, any time before litiscontestation, is master of his own process; and if he please not the measure of justice he is like to get there, he may take up his process and intent a new pursuit before the Lords, which is a more natural way than to bring it in by way of advocation: though I cannot see it could be refused, if a pursuer should desire to advocate an action to the Lords, he declaring he passed from that instance he was pursuing before the inferior court. I hear the Lords have lately permitted a pursuer to advocate upon inequity done him. *Advocates' MS. No.* 370, *folio* 149.

1672. *July.*

ABOUT the same time there arising a competition betwixt an executor creditor, and the landlord of the house wherein the defunct died, and who was owing him two terms' mail: the landlord claiming the household plenishing *jure hypothecæ*, which the law gives him in the utensils and domicils, the same was opposed by the executor creditor, because he offered him to prove that the greatest part of that household furniture which he had confirmed, and which the landlord acclaimed, though it was standing in the house, yet it never belonged to the last defunct, who stood personally obliged for the mail to the said landlord, she having taken the house off him; but it properly and truly belonged to her husband, who had died some two years before; *et jure quodam familiaritatis*, she had retained and continued the possession of those goods, which formerly she had conjunct with her husband; and that she never had any right to them established in her person any manner of way; but they solely appertained to her husband, who being debtor to him in a certain sum of money, he had confirmed the said goods, as executor creditor to the husband. It may be also urged, that *in generali rerum obligatione, præcipue tacita, nunquam continenter ea quæ verisimile est quemquam specialiter obligaturum non fuisse; l.* 6 *D. de pignoribus. Vide Harprecht ad par.* 7. *Inst. de actionibus, No.* 18, *et seq.* But it may be said, that in poinding of the ground, any goods, though not belonging to the debtor and heritor of the ground, if found thereon, may be taken and poinded; *ergo*, here the landlord may take any goods he finds in his house.

To which it was ANSWERED,—That the law was absolute, and distinguished not, *et ubi lex non distinguit, nec nos;* that it had positively adjudged a tacit hypothec

to the landlord, *omnium mobilium quæ induxit inquilinus in domum conductam*, and to the master *in prædiis rusticis in omnia invecta et illata a colono; item omnia bona in navi hypothecantur pro naulo.* And it were a very unreasonable faschery and vexation, yea, both impertinent and distasteful, to put landlords to inquire or try if the goods that are in their tenants' houses be theirs, yea or no, seeing the finding of them in their possession presumes and induces the property.

REPLIED,—It is extremely absurd to think that if I should lend or depositate and set by any of my household stuff beside a friend, that his landlord should have a right of detention of my goods, albeit I prove to him that they are mine, which takes off that weak presumption of being found in his possession.

And this privilege of tacit hypothecation ought not to be stretched beyond the true limits of law and material justice, or to give him an interest in the goods within the house, any farther than the same belongs to his tenant; and I think it would be so found by the Lords: yet the present case seems to be clothed with some more favourable circumstances; as, that she was the wife, and only continued her former possession, and had used them as her own *jure familiaritatis* two whole years; which in moveables may be enough to prescription, if not of the property against the true owner, yet at least *ad hunc effectum* to give the landlord a hypothec in them for the mail addebted by her who had so peaceably possessed them, though without a title. But whatever be in this, there is no doubt but the landlord's hypothec will stand good in them *quoad* a third: because, as relict, the law appoints her a third; and though she had not legally claimed it in her lifetime, nor established the right thereof formally in her person, yet the landlord, as creditor to her, may now seize upon it. *L.* 41 *D. de acquirenda possessione. Vide omnino* Matthæum *de Afflictis, decisione Concilii Neapolitani* 184.

Advocates' MS. No. 371, *folio* 150.

1672. *June, July, and November.* LORD HALTON, Treasurer-depute *against* The EARL OF NORTHESK and other creditors of the EARL OF DUNDIE.

1672. *June* 22.—THIS following point went to interlocutor: whether or no a *de novo damus* from his majesty does not import to the vassal receiver, discharge, liberation, and, exoneration of ward, marriage, feu-duties, and all other casualties due furth of those lands preceding the date of the said charter. Though this was looked upon as a principle wherein there could be no controversy, yet it was alleged by some, that unless it were superscribed by his majesty's own hand, he could not be prejudged by such gifts, and that the sloth or negligence of his officers of state could infer no wrong to him. *Vide* the 14th act of the Parliament 1600.

This is a miserable and pitiful way of venting our wit, by shaking the very foundations of law, and leaving nothing certain. But the true source of all is from the woful divisions in the house, especially between the president and the advocate; each of them raking, though from hell, all that may any way conduce to

carry the causes that they head. *Flectere si nequeo superos*, &c. *Vide supra*, 339, [15*th June*, 1672.] *Advocates' MS. No.* 344, *folio* 135.

July.—THE treasurer-depute, as he who has obtained the gift of the marriage of the late Earl of Dundie, which marriage existed through the decease of the Lord Dudhope, father to the said earl, pursues declarator for the avail of the said marriage, against my Lord Dundie's whole creditors. In which action it was ALLEGED for the EARL OF NORTHESK, that no marriage could be declared against him, nor could the avail thereof (whatever the Lords shall modify the same at,) ever affect the lands of Craig, which were transmitted to him by progress from the said Earl of Dundie, whose marriage was now sought to be declared; because, upon the said earl's resignation, and a signature superscribed by his Majesty's own hand, he stood infeft in these lands with a *de novo damus*, which must import to him an exoneration and discharge of all casualties due furth of these lands preceding the day and date of the charter.*

The Lords found the *de novo damus* did not discharge this casualty of the marriage, because there being many casualties named in the said clause, viz. wards, reliefs, non-entries, escheats, forfaultures, bastardies, recognitions, last heir, &c. the marriage was not expressed; and as to the general clause, whereby his majesty gives, grants, and dispones the said land, and all right, title, interest, or claim of right he has thereto, by whatsoever manner of way, preceding the date of these presents, they found not that sufficient to bear a discharge of a marriage, because the king transmits nothing by these general clauses, and he can give nothing away but what is specially named: that a *de novo damus* secures allenarly the property of the land, but does not secure against prior casualties, because his majesty cannot be prejudged by the negligence of his officers.

I never observed an interlocutor so generally displease as this did. I found no lawyer, neither great nor small, would own or seek to justify it, but all cried out that the foundations were shaken; the security of the lieges was overthrown; all their rights were branled; that the screwing up the casualties of superiority at this rate, would make the whole kingdom think the king the worst and unsurest superior they can hold of. It made all in mockery speer who was pursuer, and if he had a brother. My Lord Halton's own advocates confessed it was horribly arbitrary and unjust. Sir George Lockhart, who was one of them, asserted that his goodfather would have quit his land sooner than passed such an interlocutor. I never heard it doubted but a *de novo damus* did cut off all bygones, that they could never be sought; that it had been ever so advised by all lawyers; that because it excluded his majesty from all precedings, therefore the composition was raised considerably higher than what it used to be in ordinary cases, where that clause was put in; that it passed for an uncontroverted principle, (if so be we have any in our law,) that if a subject superior give a charter to his vassal with such a clause, it undoubtedly cuts him off from all he can claim out of that land preceding its date; that a *de novo damus* is an original gift, and has all the words of a new donation, *videlicet, exonerando, transferendo, et extradonando*;

* The farther arguments that were urged, especially from the practique in 1611, and Peirston's practique in 166–, are to be seen in the informations beside me.

that the king gives the land by this clause *prout optimus maximus est*, and so free from all antecedent incumbrances; that their finding the marriage not to be discharged, because not expressed, was nought save a silly evasion, seeing, though not one of them had been enumerated, they were all cut off thereby; that the just bounds of all things were confounded; that strange things were hurried through in Parliament, and things as strange were advised with close doors in the session, and reported again at side bars; that no man talk of decisions after this; that all other decisions, though blameable, could shroud themselves under some cloak of law, but this stood naked; none was found who would either own or palliate it: that the least they can modify the avail to will be 20,000 merks, seeing he got that in tocher with Dalhousie's daughter: that he will betake him to any one creditor he pleases, and affect his land therewith, the same being *debitum fundi*, and will leave him to his relief of the rest: that the pursuer being likewise donatar, and having the gift of *ultimus hæres* of the said earl and his heir, he must warrant the rights and infeftments granted to them by his predecessor, and so this gift of the marriage can no more prejudge them than if the deceased Earl of Dundee, their debtor, and author in the lands they possess, or any to his behoof, had procured the same; that he may not renounce the same now to their prejudice, since he has made use of it already. *Vide infra, No.* 368.

Advocates' MS. No. 361, *folio* 147.

1672. *July.*—ABOUT this time, in the recognition pursued by the Lord Treasurer Depute against the Earl of Northesk, and the other creditors of the Earl of Dundee, the lords found the lands of Craig had recognosced in his majesty's hand, through a disposition thereof, made *in anno* 1659, by the laird of Craig to Pittarrow, and a base infeftment taken thereupon; notwithstanding it was ALLEGED, 1*mo*, That, *ante omnia*, my Lord Halton ought to make patent to them the charter kist which he had got delivered to him, to the effect it might be tried from the old evidents and charters, whether these lands held ward yea or no, and which might furnish them with many other defences. 2*do*, That the disposition made to Pittarrow could never be the ground of a recognition, because it was reduced and *funditus* taken away in Parliament; which annulled it *quoad omnes effectus*, as if it had never been, especially seeing it was reduced *ob defectum consensus*, it having been elicited from him when he was drunk so extremely, that he had not the use of his reason. For though the reduction of a disposition of ward lands, and of a base seasine taken thereon, because of informality, not registration, or the like, does not hinder the incurring of recognition, because the vassal *fecit omne quod in se erat;* yet if such a right be reduced for want of consent, there no delict is committed, (seeing *animus et propositum faciunt maleficium;*) the vassal is not guilty of ingratitude, and, therefore, ought not to be punished with the tinsel of his lands; and it is the same as if an idiot or furious person should alienate ward lands without his superior's consent; in all which cases *animus delinquendi præcipue spectandus est. Vide omnino Craig, lib.* 3, *page* 344.

The Lords, before answer to this allegeance, ordained the grounds and warrants, and other minutes of that decreet of Parliament in 1661, to be produced before them; (though I cannot see what power or right they had to call for the warrants of a decreet of Parliament, or to try and canvass upon what grounds the same proceeded, and if they were warrantable and rational:) and on perusal of the de-

positions of the witnesses, whereupon the decreet proceeded, they repelled the defence; in regard it appeared from the testimonies, that Craig's drunkenness, the time of the making of that disposition, was not so deep as that he was wholly bereaved of sense and reason; but that he acted by a will and consent, though not altogether so clear.

3tio, It was ALLEGED, that it was granted the time of the usurpers, when all ward holdings were discharged, or it was agreeable to the 58th Act of Parliament in 1641, then standing unrescinded, which appointed all such lands to be holden feu; and betwixt the time it was granted, and the time of its being questioned in Parliament and reduced, there were no judicatories sitting, wherein he might have obtained it confirmed; likewise, if it had not been annulled by a decreet of Parliament, he would have obtained a confirmation thereof, long before the date of the pursuer's gift of recognition, and so would have excluded the same. Notwithstanding of all thir defences, the Lords found the recognition of the lands of Craig incurred. As also, notwithstanding it was alleged, that Pittarrow was Craig's apparent heir mediate at least, to whom alienations do not infer recognition. *Vide Craig, page 345.* This was repelled, because old Pittarrow was the immediate nearest heir. *See Hadington, penult February*, 1612, *Rae* against *Kellie.*

As for the barony of Dundie, it was ALLEGED, that the deeds founded on could never infer recognition thereof, seeing they were far within the half of the said barony as to its ancient extent. Whereunto it was REPLIED, that in the computation of the total of the barony, no lands, whereof there were public infeftments granted, either by resignation or confirmation, could be reputed a part of the barony, because they were thereby dismembered; and the remanent could only be esteemed the barony, the major part whereof was alienated. DUPLIED,—The Earl of Dundie retained the *dominium directum* of these lands, and they behoved still to be reputed parts of the barony, &c.

The Lords found the alienation of the major part of the lands remaining unresigned and unconfirmed, made those parts of the barony to recognosce, and therefore repelled the allegeance.

But the truth is, the Lords were so stated at this time, that hardly any *thing* could have been proposed against this recognition, over the belly whereof they were not inclined to go. *Advocates' MS. No. 368, folio 148.*

1672. *November.* IN the declarator of recognition, mentioned *supra, No. 368*, pursued by My Lord Treasurer Depute, against the Earls of Northesk and Weimes, and sundry other persons, it was ALLEGED for Weimes, that no declarator could pass in his prejudice, because he stood infeft in an annualrent, furth of these lands, confirmed before the gift of recognition. This defence at first proponing was found relevant; but thereafter, it having been answered by the pursuer, that they behoved to say, confirmed before the incurring of the recognition whereupon the gift is grounded, viz. Pitarrow's base seasine in 1659; the Lords repelled the same, in respect of the answer, or reply. Whereupon Weymes, having applied for a new hearing, it was most contentiously debated, Whether or no ward lands could recognosce, in prejudice of an infeftment confirmed before the gift, but after the delict and forfaulture of recognition was committed, by the undue alienation of the said lands without the superior's consent.

Wherein it was ALLEGED for the Earl of Weymes that the common law, our laws, and acts of Parliament; Craig and all that write *de feudis;* the Lords' constant tract of pratiques and decisions; the universal opinion of all lawyers; and the security of the lieges, (which here ought to be *suprema lex,)* seem to have settled this so far above all the rational limits of a just contradiction, that to hear it now drawn in question, strikes us all with amazement, doubting where such scepticism may end, and if this arbitrary latitude of ransacking principles will leave us any thing fixed or certain at all; that upon the faith of these laws all the subjects of Scotland have hitherto rested, ever understanding and supposing that an infeftment confirmed before the gift was most sufficient in law to secure that infeftment against any recognition gifted after the confirmation, though the grounds of the gift should be prior to the confirmation; else all the ward lands of Scotland should be now found open to recognitions, the interests of the people should be branled and prejudged, and a door opened for drawing all their rights under hazard and question; that his Majesty, by granting a confirmation, doth consent to the vassal's right, and so can never quarrel the same upon any preceding recognition whereby the property of the lands was returned to his hands; that *confirmatio illius qui dare potuit est donatio;* that confirmations are the ordinary way for securing rights against the hazard of recognitions; that Craig, *Tit. Quibus modis feudum ob delicta amittitur,* (page 347,) is positive that any ratification, express or tacit, as the superior's accepting a resignation, and giving charter thereupon, doth purge prior recognitions; that the Lords have so decided *in foro maxime contradictorio,* as Hadington marks it at the *penult* of *February,* 1612, in the cause of *Rae* against *Kelly,* where this defence was sustained against that recognition, infeftment confirmed before the date of the donator's gift, which is clearly the present defence; and yet the pursuer's grounds, he now insists upon, were then urged and repelled; as also it was found relevant against a process of recognition pursued by *Sir G. Kinneird* in 1665: that the defender is *in damno vitando,* which excuses ignorance of subtilities; but the pursuer is in *lucro captando.* The defender is founded in the common opinion of the whole country in unanswerable decisions, and in the uncontroverted authority of the most eminent lawyers: whereas the pursuer hath no vestige of any authority, grounded only upon new notions, innovations, and distinctions, which, if they were sustained, no man could be secure for an hour of his estate; and that this being *tentus et habitus* for law hitherto, the most that in any sense or reason can be done, if the Lords will alter their former course, is to rectify it for the future, but not to ensnare any who, upon the faith of so many combining grounds, have rested upon confirmations in times past.

To which it was REPLIED for the pursuer, that they acknowledged that a confirmation of a base right furnished a good and a sufficient interest to defend against, and purge any recognition that could be inferred upon the ground of that infeftment so confirmed, so that it could never be used either as a partial or a total ground whereon a recognition could be craved to be inferred, or a gift taken; as also it would stand invincibly secure against any recognition that should be incurred after the date of the said confirmation; but that it should sustain against a recognition founded upon a distinct and separate ground prior to the said confirmation, because forsooth the superior had not gifted the same till after the confirmation, is an assertion so bold and groundless, so frivolous and irrelevant as ever any that was insisted on, and absolutely contrary to and inconsistent

with his Majesty's interest, and wherein there is not the least shadow of a prejudice or inconvenience to the security of the people: for can there be any thing more consentaneous to the principles and nature of feudal rights, than that where *feudum fuit commissum*, and the property of the lands was returned back to his Majesty by his vassal's fault before the confirmation, that the said property should not pass from his Majesty, except by one of thir three ways, either by consenting to, and confirming of the same seasine by which the recognition fell, or by a special disposition and gift of the recognition; or, *3tio*, by a *novo damus?* and that a naked confirmation of a separate infeftment can in no law or sense be constructed a *habilis modus* to denude his Majesty of that right, that neither being *actum* nor intended, unless the seeker of the confirmation had expressed his Majesty's right, and so the King, being certiorated of his own right, had willingly disponed the same: that thir defenders, by the same rule, behoved to say, that his Majesty passing infeftment upon a resignation, or on a comprising, should thereby purge and discharge anterior recognitions; seeing it is most certain law, that infeftment passing by resignation and confirmation, are *termini convertibiles et æquipollentes* in law, and produce the same feudal effects, and yet it is grossly ridiculous *et inauditum* to imagine, that his Majesty's accepting of a resignation purges any anterior recognition, neither is there any who does affirm it: that the King having *jus perfecte quæsitum* by the illegal alienation made to Pittarrow, any confirmation he gave thereafter to the Earl of Weymes could not prejudge *him*, because *confirmatio nihil novi juris tribuit;* it is but an act of course, and the common act of his Majesty as a superior, and bearing a salvo and reservation of all right, and so can never import such a consent as to dispone away a right never mentioned nor thought upon: that the 16th act of Parliament in 1633 mentions no ways for stopping recognition, but either the superior's consent to the alienation, or a confirmation thereof: that it is so vain and foolish an imagination to think that his Majesty is prejudged and denuded by such confirmations, that no solid lawyer ever dreamed of it, so great a paradox is it; that the defenders understand not Craig, who is in the contrary opinion at p. 347, in the case there betwixt *Grange Kirkcaldie*, and *Pharnyharst's brother*. And as to their strained practique in 1612, it meets not, because there the infeftment confirmed was made use of as one of the partial grounds of recognition, in which case the Lords did decide most justly that it should stay the recognition *pro tanto;* but that concerns not our point. As for the security of the lieges, the same is in no hazard, seeing we have known ways in law condescended upon as proper to stop the danger of recognition, viz. either gifts of recognition, or a general *novo damus*, and which are ordinarily used; and no judicious lawyers, in advising securities, ever rested upon confirmations of a separate right; and where it is clamoured that the contrary hath been hitherto reputed law, the same is denied upon the grounds we have represented; but *esto* it were so, such errors and mistakes cannot be the rule for the Lords' decisions, else they should be very ridiculous oftimes: with many other things contained in the informations, which see beside me.

The Lords found the said infeftment confirmed since Pittarrow's seasine, (which was the ground of the recognition,) though long before the gift, could not defend against the recognition, but declared, in prejudice and notwithstanding thereof.

All who understood law and the former practice of the bench, were much affected at this procedure of the Lords; seeing them so influenced and bowed from above, to go over a practique so clear as that in 1612 is, and whereof the principal decreet was produced, and over so much reason as was adduced, from the unsecuring of the lieges.

Sir George Lockhart violented himself much in the affair, he never pleading cheerfully against his own judgment. When some of the Advocates were asking him what could be said against so clear a principle as that defence of my Lord Weimes' was, he faintly replied, The other opinion wanted not its own colour.

The Lords ran much divided in it, through my Lord Chancellor's interest in Weymes, who far and wide complains of the unjust measure he has got from the Lords' partiality or timorousness. *Advocates' MS. No. 372, folio* 150.

1672. *November.* MR. ALEXANDER GIBSONE against JANET RAMSAY.

IN the actions of declarator of ward and marriage pursued by Mr. Alexander Gibsone, donatar thereto, against Janet Ramsay, as heir to John Ramsay of Brackmont, her father, or George Ramsay, her brother-german, it was thought by the defender's lawyers, (and the pursuer's procurators in the debate did not controvert it,) 1*mo*, That though the ward of a man, or heir male lasts and continues till he be of the age of 21, yet that it ceased and expired in an heir female at fourteen, and that she was then major *quoad* a ward; and which is Craig's opinion, and seems suitable and consonant to the nature of ward holdings, and the superior's interest in the same. (See *Craig*, pag. 285, and the fifth Act of the Parliament in 1547, there cited, which seems to favour Craig's opinion.—See *Dury*, 19*th June*, 1630, *Somervell* against *Gordon*.) 2*do*, It was resolved, that in the modification of the avail of a marriage, as the same will be taxed with respect to the whole estate, both personal and real, that the heir may succeed to, though even but temporary rights, such as tacks of teinds, &c.; (teinds are to be deduced in the making up the avail, considering only the benefit of the tack, with deduction of the tack-duty for the years the tack hath to run: so all the personal or real debts and liferents that do or may affect the heir or his estate must be considered and defalked, to lessen the avail; which must only be modified with respect to the free estate, all burdens laid aside. 3*tio*, That Craig's opinion was absurd, and never came in practice, where he thinks the marriage of an heretrix of ward lands must be estimated according to the avail of her haill estate: which would not make the marriage a casualty or an obvention arising to the superior by the decease of his vassal, but rather a loss or extinction of the feu; and so ought to be ranked in, not amongst the profits of superiority, but amongst the ways by which a fee opens and returns back to the superior, and is amitted; and therefore the Lords have never been in use to modify it much higher than if it were the marriage of an heir male. 4*to*, It was thought, seeing the apparent heir wanted but three months of fourteen at her predecessor's decease by which the lands warded, that the donatar to the ward and non-entry would fall only a term's rent; and as to that it was a question if it ought to be

any more nor the retoured duty, because it became only due by reason of non-entry, the donatar to the ward never having attained to the natural possession of the lands. And which reason seems likewise to make, why there should be no relief in this case. *5to*, They inclined that where an heir of ward lands was within twelve or fourteen, the avail of the marriage was not due till they had arrived at the said respective years; and therefore they could not be liable for the same, whether it was taxed ward or not, till it be constant if the heir shall attain to that age or no, to make it due; and that no declarator ought to be sustained or pass thereupon before they be come to the years whereat the law allows them to marry: at least it ought to be conditionally.

When the action was called, it was alleged, *1mo*, Absolvitor as to the ward of the lands of Lucklaw, holden by that service of his Majesty, because the King has a vassal, in so far as in the infeftment of the fee given to George Ramsay, (by whose death the ward is pretended to have fallen and existed in his Majesty's hands,) there is an express reservation of his father and mother's liferent; but so it is, the mother is yet alive, and so, by virtue of the said reservation, is the King's immediate vassal, seeing she must be in the same case as if she stood infeft holden of the King, or had an infeftment confirmed; all which cases would uncontrovertedly stop and hinder the ward; and therefore this reservation of liferent being constituted and acknowledged by the superior, must stop the ward.

To which it was REPLIED,—That a reservation *non relevat*, unless we could say either a public infeftment or an infeftment confirmed; seeing his Majesty must not be presumed to give away or dispone his casualties without knowing them: and opponed My Lord Treasurer Depute's practique against the Earl of Northesk, where a *novo damus* was not found to carry casualties that were not expressed; much less then could his Majesty or his donatar be in law debarred and secluded by a naked reservation of liferent adjected to a charter of the fee, and which pass of course unnoticed, and which is scarce a real right, and which, by no presumption, could bear that interpretation.

Gosfuird was clear to have sustained our defence; but, in regard the pursuers were instant, he was to give us the Lords' answer upon it.

We not being curious of tempting the Lords with novelties, or of affording them opportunities to forge new interlocuters, and mainly because Sir George Lockhart was diffident what might be the event; we found the mother stood infeft in liferent upon her husband's resignation, beside the reservation in her son's right: whereupon, at a new hearing, we positively proponed upon her public infeftment, and which was sustained as relevant of consent.

In the declarator of the avail of the marriage, in regard they had most exorbitantly condescended upon her estate in their libel to be the rule and standard of the Lords' modification, viz. 50,000 merks, as also most ridiculously concluded that her marriage might be taxed at that total, and that she might be decerned to pay the said sum of 50,000 merks to the pursuer, as the worth of her marriage; therefore we urged for the benefit of a conjunct probation as to the value of the estate, and the debts and burdens, personal and real, that are thereupon. But it was refused us, by which we suffered; in regard, when it came to the advising,

our defalcations were not so clearly instructed as to make full faith to the Lords.

He did also pursue an exhibition against the lady, for producing the tenants' tacks, with the bonds and all other writs which might instruct his action of declarator of the avail of her daughter's marriage. Which action, though contrary to that received maxim, *nemo tenetur edere instrumenta contra se*, yet was sustained, and he found to have sufficient interest to call for them; and, therefore, the lady produced them all upon oath.

The probation used in the declarator of the avail of the marriage, coming to be advised on the 18th of June 1673, it was then ALLEGED, for the defender, that, before they entered upon the matter, there were two preliminaries they would offer to their Lordships' considerations. The first was the extreme precipitation was used in the procuring and expeding of this gift now pursued upon: Jo. Ramsay not yet buried, scarce known in the city to be dead, the first Friday thereafter is a signature stolen up upon the Exchequer wall, revised in Treasury, passed in Exchequer, directed to the privy-seal by the signet, and passed there, and its seal appended, all in one day; express contrary to the just and rational statutes of the Exchequer, discharging any signatures to be revised or passed that day they are first affixed, but to stand till that day eight days, that nothing be huddled up, and none be hurried and surprised. If the common law punished that creditor who molested or unquieted the heir, or moved any thing against him, before nine days were elapsed from the defunct's death, by the loss of his debt; if it used a stranger thus, how much more severe would it have been to this pursuer and his brother, (for whose behoof this plea is carried on and managed;) considering thir two aggravating qualities, first, that he is son-in-law to the defunct, and so, by his forbearance, should have paid more reverence to the ashes of his father-in-law, and not have thus, for his own gain, so quickly contradicted his will and lacerated his family. But, next, he should have remembered that his being a member of this house, demanded of him more candour and ingenuity than any he has shown in this affair. The whole country is full of murmurings and complainings at the indirect usage and trepans they meet with when they have to do with members of the Session. And when they see such traits of legerdemain as this, will not all then conclude these rumours to be too true? So that I really think, that all persons of honour belonging to this house should be so far from taking such advantages, which justly open the mouths of the people against us, that whatever favour is to be indulged, in point of dispatch or otherwise, is less to be used by them than any others. *Vide infra, Sibbald of Keir* and *Glenfarquhar*, [*No. 729, 26th February* 1672.]

The next thing I have to represent to your Lordships is, that the same day this pursuer's gift is here passed in Scotland, there is a signature passed, under his Majesty's royal hand, at Whythall, (for both are dated 23d of February 1672,) disponing the lands of Lucklaw to the deceased Jo. Ramsay in liferent, and to this defender, his daughter, in fee, containing an ample *novo damus*, (*nota*, it wanted the word "marriage," and so would not sustain, because of Halton's practique; 2*do*, Not passed in Exchequer, so that the pursuer's was the first complete gift,) and therefore must be a discharge of any ward or marriage that was fallen by the decease of George Ramsay, who died five or six months before that, and which are the casualties now insisted on and sought to be declared; es-

pecially where they are gifted to the party's self, who, of all others, is most favourable, as having most interest; as may be gathered from Hadington, *in a* very like case between *the Earl of Argyle* and *Ardkinlas* at *the last of November* 1609, it is *numero* 31. This being permitted, it is humbly desired your Lordships may seriously consider and ponder, in the taxing and modifying of the avail of this young gentlewoman's marriage, that we should heartily thank thir pursuers for the high estimate they put upon her estate, if we could be persuaded that it proceeded from any kindness and good intention to her ward; but they must not be offended at me if I shall bring it down to the half, and make them a frank offer of the haill at that rate; which will be very easy to demonstrate from these particulars,—that the said land is so miserably racked, and the tenants thereof so impoverished and harassed, that albeit it may be it is proven to be set at present for twelve chalder of victual, yet any who have a solid and clear rent will never extort beyond ten. Next, it lies in Fyffe, and in the midst of it, in a country all sanded and overblown, producing nothing but oats, and these not worth eighty merks the chalder; it holds ward; and they have no other right to their teind but a tack within eight or nine years of the expiring, and they pay one hundred merks yearly of tack-duty. Besides, much of it is casual rent, viz. the rent of a miln. It is true, this might seem an opulent and considerable fortune were the heir in possession of it; *but here she cannot* get possession of a fur of it; her mother liferenting the whole, who is a person who, in all probability, and according to the course of nature, may live these twenty years. Neither is she in a whit better case as to her estate in money; for beside that some of it is desperate, and so in no reason can augment or inflame this count, it is all liferented by the mother as well as the land is: so all her estate can be looked upon no otherwise but as a naked fee, and wherefrom she may be long enough secluded. In respect whereof, it is humbly expected that the Lords will mitigate and moderate this avail, and decide *secundum bonum et æquum*, following that common standard they have set up to themselves heretofore in cases of this nature, viz. two years rent of that estate which is the subject of the modification, and which they seldom ever exceed:* and in regard the heir hath nothing actually, that the payment of the sum so to be decerned may be superseded till she get possession of her estate; else it shall force her to sell her heritage to her great detriment, seeing she will not be able to satisfy the same *aliunde*, and to which she will find no buyer, being a minor, unauthorized, and wanting a sentence of the Judge Ordinary finding the alienation to be necessary and to her seen weil and utility: to which sad dilemma it is hoped the Lords will not expose her, but rather find out such just remedies as may tend to the preserving her heritage from being totally swallowed up; and which makes a part of that trust in their office, for inspection over orphans and minors, that the law and the people hath reposed in them.—See the full informations beside me.

The Lords, in regard they were informed that, at a communing, 8000 merks was offered by the defenders, and 9000 was craved by the pursuers, they, in a trysting manner, divided the odd 1000 merks contraverted, and modified the avail of her marriage to 8500 merks.

* This method is used by the Lords when the double avail is decerned. See *8th March*, 1627, *Earl of Rothes* against *Balfour*.

And though the Lords have a great latitude in thir cases, yet this modification, all things being rightly considered, was most exorbitantly high as any that had been of a long time decerned.

Though we dealt to have this declared to be in satisfaction to him, not only of the marriage, but also of the ward and non-entry, to which he was also constituted donatar; yet we could not prevail: only it was not very material, seeing the ward and non-entry, as I have told before, will resolve in a very mean matter. And, in regard, this sum decerned is in law *debitum fundi*, so that the donatar might poind the ground for it; therefore, the mother for her right of liferent, and the daughter as fiar, assented to assign him to as many bonds as would make up the sum decerned: and which he accordingly accepted of: and the mother protested that her daughter, as heir to her father, should be liable to make up that loss she had sustained in quitting her liferent of the sums assigned; and which protestation the Lords admitted.

In the canvassing of this affair, the following case fell transiently in: John Ramsay had granted a bond to Mr. George Gibsone, his goodson, for 6000 merks; this bond he kept beside him till near his death, at which time, for reasons known to himself, he cancelled the bond, with this elogium on the back of it, that the said party had disobliged him, and deserved no favour at his hand: the question moved was,—if a man may, upon death-bed, cancel an heritable bond (whether it bear a destination for infeftment, or only a clause for payment of annual-rent, *non refert*,) lying beside him in his own custody, and which was never delivered, but bore a clause dispensing with the not delivery. I thought it very lawful; for, if the law hath had so special a care of heirs, that it incapacitates any to do deeds to burden them, or to their prejudice, while they are in *lecto*, then certainly, *a contrario sensu*, it approves of any deeds he shall then do to liberate his heir of a debt, such as this deed is: that the whole strain of law is so contrived that it may be ever *pronior ad liberandum quam obligandum, l. Arrianus, 47 D. de obligationibus et actionibus*. Likeas, who can dispose so well and adjust so rationally the portions and several distributions of children as the father, and who can justly impede him in abstracting his favours from those whom he has found ungrate and impious, and whereof he must be presumed absolutely the best and most knowing judge?

Advocates' MS. No. 373, folio 151.

1672. *January and November.* JAMES DUNDAS and OTHERS, Creditors of PARK WHYTHEAD, *against* THE TOWN OF EDINBURGH.

January.—In January this Session, was called the action pursued against the Town of Edinburgh by James Dundas and other the creditors of Park Whythead, for payment of their respective debts, because he having been incarcerated within their tolbooth of the Cannogate, he had escaped.

Against which it was ALLEGED, that the 173 act of the Parliament 1597, appointing all burghs to have sufficient gaols for detaining of prisoners, must only be understood of burghs royal (who, in regard of the many privileges granted to them by the King and his ancestors, must not complain of this burden imposed on

them,) but noways of burghs of regality, such as the Cannogate is: that burghs of barony, *first*, are not bound to accept the King's rebels offered to them; next, though they receive them and let them escape, yet they are not liable for the debt. *Vide* Dury, 13*th March* 1623, *Moody* against *the Bailies of Dunce; item*, 12*th February* 1624, *L. Langton* against *the Bailies of Dunce.** *Ergo*, the same must obtain in a burgh of regality, there being no assignable disparity.

To this it was ANSWERED, whatever exemption burghs of regality may pretend to, of being free either to accept prisoners or not at their pleasure (which is not leasum to burghs royal,) but *esto* it be *voluntatis ab initio*, yet having once accepted them, it becomes *necessitatis*, and they must answer for them, else the lieges should have no security: but this needs not be reasoned now, seeing it was debated, *in foro contentiosissimo* for *the town of Falkirk* against *James Hamilton, merchant in Edinburgh*, in 1688, that being only a burgh of regality, they could not be liable for the escaping of prisoners; and the Lords found they were answerable for all they received: and though the same was alleged in behalf of the town of Falkland, pursued *actione hac subsidiaria* by Mr. James Cheap, yet were found liable notwithstanding. But for Falkland, it seems to be a burgh royal as I observed *supra*, at number 132.

My Lord Castlehill repelled the said first allegeance made for the town, and ordained us to say farther. *Advocates' MS. No. 331, folio* 131.

1672. *November.*—In the subsidiary action mentioned *supra* at number 331, pursued by James Dundas and others against the Magistrates of Edinburgh, for suffering Park Whythead to escape out of their prison of the Cannogate, the defence then proponed by us being repelled, we ALLEGED, 2*do*, absolvitor from this pursuit, because neither fraud, negligence, connivance, nor insufficiency could be any way qualified, either against the prison, the jailer, or the Magistrates, defenders, in so far as the manner of the rebel's escape was truly in law *vis major et casus improvisus et fortuitus*, which could not be obviated by common human providence, and which the Magistrates *non tenentur præstare*, in so far as the tolbooth of the Cannogate is most sufficient, and in the same condition it hath been now past all memory; that this rebel was kept with more jealousy and strictness than any other prisoners for civil debt were; that the manner of his escape was by winning into the bell-house and towing himself down from a window thereof five story high, which no rational man that had any regard to his life would attempt. *Vide infra, No.* 473, *Captain Martin.*

To this it was REPLIED, that, in his escape, the negligence and carelessness of the keepers† did no less evidently appear, than did the insufficiency of the jail, for, 1*mo*, The jailer was advertised of his design to escape, and therefore was required to keep him in the iron-house, and which he obeyed not. 2*do*, It was a palpable negligence that he suffered tows to be brought in to him. 3*tio*, It was blameable that he permitted him to have access to the bell-house. 4*to*, As also, that either he should have got the key or its impression. 5*to*, The prison's weakness is clear in this, that his escape was made without the least violence done either to door, window, or wall, and so cannot be termed *vis major*. 6*to*, Its insufficiency is yet

* Yet, by the consequence of the decision marked by Dury, 21*st March* 1627, *Earl of Cassills*, though none beneath bailies of regalities are liable to obey these charges, yet they are; as also appears from the 19*th of November* 1628, *Ray* against *Douglas*.

† And which the Lords require oft in such cases. See *Dury, 6th of July* 1631, against *Bailies of Perth*, with its marginal citations; and which might have been pertinently urged in this cause.

farther demonstrable, that there was no stanchells in the window out at which he escaped; that they have stanchelled it since; and that a woman imprisoned in that tolbooth for being suspected as accessory to the murder of Mr. Bedford in Leith, escaped forth thereat of before; and so could not be such a desperate attempt as was never undertaken. *7mo*, There was no such hazard in the descent as was represented, because there are two flat roofs in the way, upon which they may rest in the downcoming.—*(See all more fully in both parties' informations.)*

My Lord Castlehill, before answer to the relevancy of the debate and mutual condescendences made by both parties, as to the manner of the escape, ordained them both to adduce witnesses for proving the points of their mutual condescendencies. (For though conjunct probation be very dangerous, yet in defences and replies simply consisting *in facto*, as this, it is both ordinary and just.)

I dealt extremely to have had it allenarly an act before answer as to the whole; both our first defence, founded upon its being only a burgh of regality, and this second, founded on the casual way of the escape; and not to have been in an act of litiscontestation. But the pursuers opposed it, that so they might get us bound in an act of litiscontestation; and I could not prevail, in regard defences consisting *in jure* cannot be reserved before answer; but their relevancy must ever be discussed and premised to the probation of points standing *in facto*.

The probation being closed, and in the beginning of November 1672 being advised, and the advocates called in; and the pursuers having resumed the cause, and enlarged the articles of negligence and insufficiency aforesaid, it was ANSWERED for the defenders, that the ground and foundation of this subsidiary action in law is either the insufficiency of the prison, or the neglect and default of the keeper. As to the *first*, it was well known that the tolbooth of the Cannogate had been a most sufficient prison past all memory, and few better in the kingdom, and wherein hundred of prisoners for civil debts, and malefactors upon criminal accounts, have been safely detained, and never able to make their escape; at least it was now, and at the time of the rebel's escape, in the same very case and condition, and as strong and as well in repair now as it was at the beginning, or hath been at any time since past memory. As to the *second*, there is no qualification of negligence can be justly inforced upon the jailer, for it cannot be instanced that ever a prisoner for debt did attempt so dangerous an escape. And as for the woman they instance, 1*mo*, She was imprisoned for a capital crime. 2*do*, In the escape, she fell, and so bruised herself that within a few days she died. And as to the bringing in of ropes, it is supposed to be proven by the witnesses' depositions, that they were knit together of many pieces, the inbringing whereof no keeper of prisoners for civil debt could obviate or remeid; seeing they may bring them in into their breeches, or wrapt about their waist, and no keeper hath power to search them, though he did suspect them, as he cannot probably do; likeas he can hinder none from having access to such prisoners. As to the window from whence he came, it was ordinary for prisoners to escape even out of the castle of Edenbrugh; and yet none will think the castle an insufficient prison for all that. That the measures of these things were not to be taken from what desperation and hard usage might prompt one man to, but the general rule of law was what the most of men, or a rational man, would undergo in such a case. That the rebel, concerning whose escape they now controvert, was driven to that despair by the unusual strictness and severity of the pursuers, in causing keep him

the iron house, as if he had been a malefactor: so that the keeper is so far from deserving censure for his remissness, that if he were to be punished at all, he rather deserves it for his cruelty to him, and which he used by some of the pursuers their instigation allenarly. And hoped it was clear, by the witnesses adduced that he was better and more narrowly watched than any other prisoner. Likeas the witnesses adduced for the town, are far more famous and honest persons, and to whom more credit was to be adhibited, as more pregnant and knowing, than the pursuers', in so far as some of them were fellow-prisoners with him at the time of the escape.

We caused make most diligent search for finding out the rebel, that so we might have sifted him again, *in eadem causa*. Yet the Lords have never sustained that as sufficient to assoilyie magistrates. So Dury, *27th March*, 1623, *Smith*; and *22d January*, 1629, *Scrimgeor*; though the same be downright contrary to the common law, *L.* 8, *p.* 7, *D. de Pœnis, Carcer ad continendos homines, non ad puniendos, haberi debet*: but our reason in making the prison a part of their punishment, is *ut squalore carceris* they may be at length forced to pay their debt; but if this were a good or adequate argument, then to make it truly irksome and loathsome to debtors, prisons should only be built in the most noxious and unwholesome airs; their diet should be restricted, and all other severe courses followed, that may render their life grievous and wearisome to them. *L.* 2 *C. de Exactoribus tributorum*. That the jailer is liable by the common law, *vide L.* 4 *C. de custodia reorum*; yet that that law seems only to be anent malefactors.

The Lords upon this debate, (which was on the 9th of November,) and after consideration of the testimonies, found no fault nor negligence of the jailer, and therefore assoilyied him and the magistrates upon that account; but before advising of that member, of the insufficiency of the prison, through the not stanchelling of the window whereat the rebel escaped, they ordained the Lords Colinton and Newbayth to visit the said prison and window, and to consider if a prisoner might, without danger, make his escape forth of the said window by the help of tows; and they to report their opinion therein.

We were very glad at the gaining of this step, taking it for a good omen to the whole cause: but we did not at first discover my Lord President's design and draught in it. He had been strongly solicited by his Lady, in behalf of Daniel Rosse, the keeper; therefore, for securing of him, he passed the first part of the interlocutor assoilyieing him from all fault, but resolved in the last part to ensnare the town, and find them solely liable for the debts, upon this ground of the prison's being insufficient; and this to gratify the Dundasses, for whom Sir Jo. Dalrymple and his Lady agented shamefully. But when we felt his breath, it made S. A. R. bestir himself more actively with the rest of the Lords, to break the President's project: and who were concerned, for reasons of state, to see it succeed well; his enemies at that time, as Sir George Lockhart told me, lying at a wait for this advantage against him, yea, wishing and soliciting the town to lose the cause. However, bowls rolled so well, that, whether through importunity or through a timorousness of nature, the foresaid two Lords reported verbally, this 16th day of November, that there was hazard in the descent: though the pursuers and sundry others offered to go out at that same window, and come down without the least

hurt or cause of fear of danger. Whereupon the major part of the Lords assoilyied from the whole libel.

When the cause was first consulted, Sir George Lockhart was mighty diffident of it, abusing Daniel, and telling it was impossible but the town would tyne it, and be found liable; and recommended to me to see the debts, hornings, captions, and arrestments were clear, that as little debt might be fixed upon the town as could be; yet, Mr. G. Norvell had ever hopes of it: but we had so good a care of the probation, and managed it so dexterously, that when we came back with the depositions to him to advise, he became more confident, and asserted, if the Lords judged aright, and considered all the qualifications of diligence proven, and especially that the prison, though it were insufficient, yet that it was in as good case now as at the first building or ever, they could not but assoilyie.

The president was in a great chaff, pretending the absolvitor was contrary to all law, and that if such slender grounds as these were sufficient to free and acquit magistrates from thir pursuits, there should never be magistrates found liable to the world's end; and that in the like cases there have been stronger condescendencies made, and more pregnantly proven, for defenders, and yet they condemned: and therefore would not insert it as a practique in his book he was composing of his daily observes.

The judgment and censure of the advocates upon this decision was various, (as it is in most other cases;) but many condemned it as strange and dangerous.

In case we had lost that part about his casual escape, we were resolved to have recurred and questioned the relevancy of that part of the summons wherein they craved not only the jailer and bailies of the Cannogate to pay them their respective sums, in respect they had suffered the rebel to escape, but also the provost, bailies, council, and commonty of the burgh of Edenbrugh, as lords superiors of the said regality and barony of Cannogate, and from whom the bailies thereof derive their power, authority, and jurisdiction, and so are liable for their malversation; and also as the persons from whom the said jailer has his commission, and to whom he has found caution, and so must answer for his negligencies and omissions; and which was entire unto us, in respect of a reservation contained in the act of litiscontestation, of all our other defences; which I think was scarcely regular: but we were not put to this dead lift.—*Pœnæ depensæ non solent repeti, lege* 42. *D. de condictione indebiti;* and so the bailies of the Cannogate could never in law have recurred upon the magistrates of Edenbrugh, their constituents. We were also resolved to have craved absolvitor from annualrents since the horning, on Durie's decision, marked *29th June* 1626, *Haliburton*, &c.

Advocates' MS. No. 374, *folio* 153.

1672. *November.* GEORGE HOME *against* WILLIAM BROWN.

IN the same month of November, 1672, in an action pursued by George Home, merchant in Edinburgh, against William Brown, writer there, it fell to be debated, but not decided,—1*mo*, If a base right, with a pursuit for mails and duties thereupon some three days before the date of a public infeftment by confirmation, will be sufficient to prefer the said base right to the public infeftment,

especially seeing the intenting of a process for mails and duties can be no such qualification of possession as can clothe or prefer the said base right. *This is* very dubious.

Secundo, Quæsitum, in this process, if a bond or other writ be false in the date, as being antedated, whether that will so annul the whole deed as to make it fall *in totum,* or if they will be permitted to rectify the same; especially where the party-quarreller is found to have no prejudice by the changing or altering of the date, or to have no interest though it were of that date which he contendeth for. Yet Sir George Lockhart concluded such a deed would be utterly null. And it was remembered how in *Shaw* and *Calderwood's* case in *July* 1670, (which see *supra,* No. 60, *) where a disposition having been granted on death-bed, and antedated, and quarrelled on these grounds, and being proven to have been false in the date, and not subscribed at that time it bore, the Lords did annul and reduce it simply, as if it had been granted on death-bed; notwithstanding that the defender condescended upon the true date thereof, and offered him to prove that when it was truly subscribed the granter was not *in lecto,* in so far as he came to kirk and market unsupported after the same, and so the pursuer had no prejudice, nor the defender advantage, by the change of the date. Which the Lords repelled, as is said, and notwithstanding thereof found the said disposition null; which they judged necessary for the better coercing and restraining of that growing falsehood; and which though not punished hitherto, otherwise than by the annulling of the deeds, yet the danger may result to men's securities by such increasing boldness, seems necessarily to require some farther censure. And the pretence, that the party hath no prejudice by it, ought no more to be regarded here than by the 22d act of Parliament in 1621, the allegeance, that they only made a false writ, but never used it to the hurt of any, is not sufficient to liberate them from the punishment of forgery.

Neither was this a new decision; seeing Dury, at the 10*th* of *February,* 1636, *Edmiston* against *Syme,* observes the same to have been so found by the Lords then; as also, Craig, p. 156, is clear of this opinion: *Quod non est verum in data quam præ se fert, præsumitur non esse omnino verum, nec ullo tempore fuisse gestum.*

Advocates' MS. No. 375, folio 155.

1672. *November* 20. GEORGE AND DONALD CAMPBELL *against* THE EARL OF ARGYLE.

MR. GEORGE and DONALD CAMPBELLS, sons to George Campbell, Sheriff of Argyle, as executors to their brother, Mr. Archibald, who had right from his father to the bond undermentioned, pursued the Earl of Argyle for payment of the sum of 8000 merks, contained in a bond granted by him to the said George. The DEFENCE was, that he offered him to prove by George Campbell, the cedent's oath, that the bond was granted blank in the creditor's name to M'Naughtan, and that the same was granted *ob turpem et inhonestam causam,* and so was null,

* See it fully at the 11th of February, 1669, *Shaw and Haydyside* against *Calderwood; infra,* No. 431, in November 1673, *Lady Grange; infra,* No. 578, § 4, [20th June 1677.]

and noways obligatory against the Earl, (and upon which reason there was reduction of the said bond depending;) in so far as the Earl and M'Naughtan having been employed in his Majesty's service against the late usurpers in 1653 and 1654, in the hills, and the usurpers having taken Sir Arthur Forbes, an officer of chief quality prisoner; as also M'Naughtan and his Majesty's forces having taken Colonel Bryan prisoner; the Earl, upon the account of furthering his Majesty's service, and for personal respects to Sir Arthur, did urge M'Naughtan to exchange Bryan, his prisoner, with the said Sir Arthur: which M'Naughtan most unjustly refused, except the Earl would grant this bond; which the Earl, finding Sir Arthur's release otherwise impossible, out of zeal to his Majesty's interest, and yielding to the present necessity, did at length condescend to; and that the same was most unjustly exacted and extorted by M'Naughtan, seeing, by the rules of military law and honour, he ought not to have refused the exchange gratis: and this benefit he made of his said prisoner was *turpis quæstus et inhonesta nundinatio; (et omne turpe lucrum* is *extorquendum;)* seeing the ransom of prisoners taken in war belongs to his Majesty, or the general by whose authority the war is managed, and not to private persons, takers, such as M'Naughtan was: and therefore the bond, as granted *ob turpem et injustam causam*, as strongly and pregnantly qualified as any can be founded in law, is null, and should be reduced.

ANSWERED *1mo*, This reason cannot meet the executors, who are not obliged to depone thereon, seeing their oath will not infer their exoneration. *2do*, The reason of reduction is noways relevant, because Colonel Bryan did *jure belli* belong to M'Naughtan, seeing *capti et capta fiunt capientium;* and, therefore, might dispose upon him as he pleased; and was not bound in duty, nor at the Earl's desire, either to release him, or exchange him, but make the best use of his prisoner he could, and apply the ransom (called in law *lytrum* or *prætium redemptionis,)* to his own particular use.

REPLIED,—That the old Roman law *Instit. de Rerum divisione, et acquir. rerum dominio*, § 17, making *capta in bello* to become *capientium*, is of a long time fallen in desuetude: so that now, soldiers do not, by the received custom and manners of most nations, any more acquire the things taken to themselves, but take for the prince, state, or commonwealth that employs them, at least for the general person, or those having chief command under them: so that it was most unwarrantable in M'Naughtan to make advantage of that prisoner, which by the law of war was not his, but belonged to his Majesty, who, or his commissioners, had the sole power of releasing, discharging, or ransoming him; especially considering that he was a staff officer, who, by the concessions of all authors, when made prisoners, do ever belong to the prince or state by whose authority the war was carried on, and never to inferior officers.—See Vinnius *ad illum parag.: item ad paragraphum, Servi, ante 3 Instit. de jure personarum, numeris 4 et 5.*

DUPLIED,—They confess, in a public, stated, and solemn war, where soldiers are stipendiary and paid by the Prince, there may be some ground to think the prisoners and their ransom *et res aliæ bello captæ* should cede to the fisk or employers; in which case general and supreme officers upon the field ought only to order and dispose the prisoners as they think fit, being taken *in ministerio publico:* but where the war is deserted by the general officers, and they are no more in the field, but the war and private acts of hostility are continued by some out of zeal to his Majesty and country's decaying interest, and hatred against the usur-

pers, without all pay, but maintained on their own private fortunes, (as was M'Naughtan's case here,) the *præda*, whatever it be, as *præmium laboris* must belong to them *quorum meruere sudores*; and that most justly: for why should that be acquired to the public treasury, where they contributed nothing to the maintenance of the said war and subitaneous excursions? and which is the case of privateers, and which we signify in these terms, of "no purchase, no pay." And therefore the general officers, Glencairne and Midleton, being then gone, he might very well sell his prisoner of war for ransom, to compense his own pains, reimburse his charges, and pay his soldiers under his command; especially considering that the Earl who transacted with him had no superior command over him to make him quit his prisoner, but upon his own terms; as also hath homologated the said deed, by granting a new bond for the same about two years after, viz. in 1656; like as he gave up this bond among the list of his debt, and got a locality in his father's estate in contemplation thereof, and which he hath possessed these eight years.

Both parties were very strong in their citations out of Grotius. For the Earl he was cited, *lib. 3, de Jure Belli et Pacis, cap. 6to, de jure acquirendi bello capta, Nis* 8, 9, 10, *et seq.*; *ubi* he expressly asserts, *Qui in militando vel quavis alia re operam suam addixerunt aliis, statim quod acceperunt acquirunt illis quibus operam navant; et qui capit per alios æque capit quam qui per se. Qui tanquam minister capit, non sibi sed ei sub cujus auspiciis bellum geritur, acquirit; quia ibi (ut habet, No.* 14,) *singuli reipublicæ personam sustinent, et proinde respublica, rex, seu populus per eos ut possessionem ita et dominium rerum captarum nanciscitur, et in quos vult transfert.* Likeas, *eodem lib. 3, cap. 7, No. ult.*; he is most positive that captives may be detained, even amongst Christians, till they pay their ransom, and that the same belongs to the taker, unless the prisoners be *personæ egregiæ dignitatis*, (which by the general consent of nations, is expounded to be all staff officers;) *in has enim reipublicæ aut ejus capiti jus dant plærarumque gentium mores.* As also, *eodem lib. 3tio, cap. 22, de fide minorum potestatum No. 9, ubi habet, Homines imperia, agros bello quæsitos concedere ducum non est, sed in tales populi vel principis est judicium sive arbitrium*; so that the taker cannot, without leave of his general, either free or otherwise dispose upon his prisoner: and which is most just; seeing the releasing or detaining of some prisoners may be of great moment to the whole fortune of the war. They also cited Bartolus et Baldus, *ad l. Nam et Servius*, 21 *D. de negotiis gestis*; but Bartolus hath nothing there to this purpose.

The pursuers seemed to be very clearly founded in the same Grotius his opinion, *lib. 3, cap. 6, Nis 23 et 24*, where he avers, that by a tacit custom it hath every where prevailed, *ut sua faciant quæcumque capiant aut socii aut subditi, qui sine stipendio, et suo sumptu, suoque periculo, bellum gerunt; imo, quando pro stipendio militant, nisi sit tale quod operæ respondeat*; which seems to confirm all they contend for.

The Lords declared they would hear it in their own presence. And though it be a very intricate case, yet, all circumstances being well pondered, I think the Earl should lose the cause.

The usual ransom of soldiers or inferior officers amongst the Dutch, is a month's pay of the prisoner; so William Aglonby, in his Present state of Holland, *page* 122, *lib. 2, cap.* 16. A. G. Costanus thinks it may be the third part of the cap-

tive's goods; *arg. p. 2, institutionibus, de successione libertorum;* but the parallel is farfetched. See him *questione* 2. Vinnius, *ubi supra*, says, *Nunc inter milites ut plurimum menstruo stipendio definitur.* See Joannes Voet, *de jure militari, cap. 5, page* 276. *Advocates' MS. No.* 376, *folio* 155.

1672. *December.* The LORD LYON *against* The FEUARS of BALVENY.

IN the special declarator pursued by My Lord Lyon, as donatar to the single and liferent escheat of the deceased Lord Salton, against the Feuars of Balveny, for making payment to him, as donatar foresaid, of sundry sums of money, contained in bonds granted by them to the said Lord Salton, rebel; compearance having been made for Arthur Forbes, it was ALLEGED the said bonds could not fall under the late Lord Salton's escheat, because this gift and pursuit was only taken by my Lord Lyon to his brother-in-law, the Master of Salton's behoof: to the which Master of Salton the said sums sought by the donatar to be adjudged to him, do properly belong, and not to the deceased Lord Salton, under whose escheat it is craved they may be declared to have fallen: in so far as the Master having acquired the right of the Lordship of Balveiny from the Lairds of Blackhall and Kinminnity, in whose persons the same stood; he, at the same time, did grant a backbond and reversion to the said Blackhall, wherein he declares, all he paid for his said right was allenarly L. 38,000, and that the same should be redeemable from him upon the re-payment of that sum; and declares that, seeing most of the vassals of the lordship were componing for confirmation of their feus, and for new rights, and from whom considerable sums of money were expected, that he should, for his own better security of payment, do exact diligence to transact with such of the vassals for new securities to be given them who had not yet transacted, and to perfect the rights and confirmations of such as had transacted already, and from both should uplift their compositions in part of payment to him of the aforesaid sum of L.38,000 of wadset; and whatever he received upon that account he obliges himself to deduct it from the said sum of L. 38,000, and impute it in payment thereof *pro tanto.* To this backbond and reversion Arthur Forbes having acquired right, is confident the Master is well near paid by his intromission with the said sums paid to him by the vassals for rights; and hath a count and reckoning depending against him for that effect: and which backbond the Master would, in a most disingenuous manner, altogether evacuate and render ineffectual, by this method and unhandsome contrivance,—that the Lyon takes a gift of the late Salton's escheat, though truly to the Master's own behoof; and under that most unjust and unworthy conveyance, should enhance and absorb the said sums payable by the vassals for their compositions, (and which were destinate for his own payment of the foresaid wadset sum, and most of them so applied, and who has sole and best right thereto,) under the late Lord Salton's escheat, forsooth, that so the Master may still have power to clog and affect the said lands and Lordship of Balveiny with the foresaid whole sum of L.38,000, as though none of it were paid; suffering by collusion the said sums to be abstracted and carried away by the donatar, though

the sole benefit of all will return ultimately to himself; that so his wadset may stand entire, and may thereby engross that whole estate by his moyen, and artifices, and dishonest trinketings, to the utter ruin of the whole creditors of the late Lord Salton.

This being the true state of the design, though the master of Salton most unjustly colludes with this donatar, that so he may frustrate the effect of his own backbond, yet Mr. Arthur Forbes, who is assigned to the same, *videt rem suam agi*, and is unanswerably grounded in law to allege and propone all that either the Master or the vassal's debtors in the bonds, and the trustees to whom they were committed in trust, should say, and which they by collusion omit; and to impede the misemployment of those sums that were appointed for the Master's satisfaction, and see them turned into the right channel for disburdening the said lands (conform to their destination) of the said L.38,000; and which being once satisfied, he hath the undoubted right of property of the said lands.

Upon which most rational interest, it is ALLEGED for him, that the bonds contraverted, granted by the vassals of Balveny, cannot fall under the late Lord Salton's escheat: 1*mo*, Because the said bonds are all conditional, and were given by them in contemplation *et intuitu* of confirmations they were to receive for the same of their several feus, *(vide infra, November* 1677, *No.* 647,) and were so affected, some of them by the very bonds, and others of them by express backbonds and counter obligements of the same date, and before the same witnesses, with their bonds, for procuring confirmations to them from the Laird of Blackhall; and which being *pacta incontinenti adjecta*, are, by all who have the least paratitle of law, reputed *pars contractus, insunt contractui illumque informant*, and militate against singular successors. And all these bonds, by the express depositions of the vassals, are acknowledged to have been given upon that sole account, and for that cause; and therefore the sums contained in these bonds can in law belong to none but those who can purify the conditions thereof, and fulfil their cause upon which they were granted: and which this donatar, nor any else, cannot do, but allenarly the Master of Salton, who hath the only power to do it, in virtue of his wadset-right, which carries the superiorities; and the vassal's debtors in thir bonds can pay to none else but him, because they are expressly destinate by the late Lord Salton, for payment of a part of his L.38,000, and he empowered to confirm their rights as come in Blackhall's right; and whenever he confirms the same, it must be in the terms of his backbond, that he have right to the compositions, and which sums and compositions he can ascribe to no other use but for extinguishing his own right. And, therefore, since the bonds were, 1*mo*, conditional, at least affected with correspective obligations; 2*do*, destinate for Salton's payment; they can never belong to the donatar, but *cum suo onere reali* of purifying the condition, or of satisfying Salton: neither of which he either will or can do. But, 2*do*, The same vassal's debtors, upon arrestments laid on in their hands by Bailie Mercer, as a creditor to the late Lord Salton, having been pursued to make forthcoming, they, upon oath, denied they were debtors to the Lord Salton; and that it was only a naked communing; and that any bonds they gave were never delivered evidents, but consigned and depositate till mutual performance, viz. till they got confirmations from Blackhall, and which was the cause of their granting these bonds; and so, not being debtors to him, they cannot fall under his escheat.

Whereunto it was REPLIED, for the pursuer, that the Lords, before answer to the debate, having ordained all the parties to be examined in whose hands the bonds were; the granters, writers, and witnesses, of the whole bonds; for what cause the bonds were granted, to whose behoof, if they were depositate, and upon what terms: and they having accordingly deponed, it is hoped they have cleared, though the bonds were blank in the creditor's name, yet that they were truly granted for the late Lord Salton's use and behoof, and that Alexander Abernethy did, in his name receive them; *ergo*, beyond all question, they must fall under the said Lord's escheat. And though, in the report of Bailie Mercer's commission, the vassals seem to have deponed otherwise, yet there is no such discrepance or incompatibility betwixt them but they may be easily agreed; and *esto* there were, this last ought to preponder, and merits more faith. *2do*, Albeit the said bonds had been granted *intuitu* of their confirmations, and the sums of them destinate for the Master of Salton's payment, neither of these can prejudge his Majesty and his donatar, but the same must be paid to him without taking any notice of these extrinsic burdens; for thir reasons, *1mo*, The vassals rested upon a naked personal obligement from Blackhall's commissioners, for procuring them his confirmation; and which was neither correspective nor real, but the feuars followed the faith of them who gave them these counter-obligements, and who had not the least design that there should be such a relation and correspectivity betwixt their bonds and thir counter-obligements as that the one could not be performed without the other, and that the mutual tie should be real, and follow the thing, and transmit to singular successors. *2do*, It was not in the power of the late Lord Salton to destinate the sums paid by the vassals in composition, in payment of any part of the sums due to the Master of Salton: and any transaction being made *stante rebellione*, could give the Master no right to these sums; seeing no voluntary right or destination thereof made by the rebel, after rebellion, can prejudge his majesty or his donatar. *3tio*, That the backbonds, or counter-obligements, are but extrinsic to the vassal's bonds, and the king or his donatar are not obliged to take any notice thereof, unless the bonds had *in corpore juris* borne that condition; (See Stair, *Tit. Obligations Conventional, Nos.* 17 and 18, where he cites Dury, 26*th July*, 1622, *Davidsone* and *Buckie*, as also *Hope:)* and, therefore, no singular successor coming to the right of these bonds can be tied by these counter-obligements; but may crave exact performance, without being obliged to offer implement to the party bound for that other part. And as this holds infallibly in all singular successors, so much more must it be true in the case of donatars to escheat, who are favourable and privileged in law, but, in this point, plead no privilege but what is their due upon their common interest of a singular successor. That otherwise a thousand inconveniences shall happen in our country, where, by reason of our poverty, most part of things are done by transaction; wherein I being assigned to a simple bond, knowing no other but it is such, I shall be eluded and mocked by some backbond and counter-obligement granted to the said debtor by my cedent, and which I must either fulfil, in this absurd opinion, or lose the benefit of my transaction. (*Vide infra, No.* 722, [*Mackeinzie* against *Watson*, 6*th February* 1678.] That a donatar of forfaultry will not be liable to fulfil such backbonds; but without regard thereto, hath right to what was the traitor's. That the law hath prescribed certain methods of relative or correspective obligations for making them

real, effectual, and transmissible, *contra tertium*, that is, against singular successors; *viz.* mutual contracts or declarations in the writ, that the right of the one shall not be valid till the other be *simul et semel* performed, or a backbond of the same date, and relating the bond and other writ; which are the known roads of law for such as choose rather *inhærere rei quam personæ*, and will the thing to be affected: but thir feuars took none of thir ways, but rely on the faith and personal obligements of the granters, against whom they have action for implement, but can never obtrude them against his Majesty, or his donatar, who, as singular successors, are not affected or concerned therewith. *4to*, This pursuit and gift is not to the master's behoof, because that defence having been proponed in the general declarator, my Lord Lyon, who is donatar, hath deponed thereon *negative*; and so being *res jurata et veritas jurata, nihil amplius quæri debet nisi an juratum sit necne.* *5to*, Though the master, by the quality of his backbond, may ascribe the vassals' compositions in payment of his own debt *pro tanto*; yet, in law, he is not obliged to it but if he please, but may ascribe it to what he please.

Whereunto it was DUPLIED for Arthur Forbes, that, as to the vassals, they have prevaricated most grossly in their second deposition, only upon the subornation and instigation of the Master of Salton; and they came with their depositions all written, and would not answer one interrogatory, yea, not one syllable more than what was taught them; and gross disingenuity appears in Duff of Drummoor his oath; and seeing the two depositions choak and interfere, *it is certissimi juris*, beyond all cavil, *standum est semper priori: ita* Clarus and all lawyers; and which point is excellently enlarged in the informations. *2do*, There cannot be a more frivolous and ridiculous allegeance than the pretence which is used, that thir counter-obligements given to the vassals are merely personal, and so cannot meet the donatar, nor any other singular successor: seeing they are *pacta incontinenti adjecta*, and are most correlative as any ever was; and, therefore, *sibi mutuo insunt, et nemo potest agere* upon them *nisi paratus sit quod sibi incumbit implere*, and therefore they must meet this donatar. And where it is affirmed that, as in gifts of forfaulture, backbonds are rejected, so here it is admired how any who pretend to law will argue from things so grossly disparate. *3tio*, Where it is urged that a rebel could not destinate, it is utterly vain, seeing here the rebel having borrowed sums for acquiring of a right, *viz.* L.38,000 from the Master of Salton for relieving the lordship of Balveny, he destinates the sums he is to get by virtue of that right so acquired, for payment and satisfaction of the monies borrowed, and by which he acquired them, *pro tanto*; than which there can be nothing more rational nor more consonant to law. As to the *fourth*, the Lyon ought to be most severely re-examined, seeing his first oath was hurried and huddled up at the side bar by my Lord Newbayth (against whom the informations are very bitter) most partially; and the gift, and all the expense since, and much of the solicitation is all by the master; so that it is nothing but an exuberant trust in the Lyon's person. As to the *fifth*, that he may ascribe or not, it is most false, and the backbond is opponed.

Many more excellent grounds of law were insisted on, which may be seen in the informations. But after great heat and many debates and hearings, and much moyen used by the Lyon and the Master of Salton, with which they thought to have oppressed the poor gentleman, the Lords generously, as I think, resenting the insolent encroachment, and pitying the weaker party, they found, after ma-

ture deliberation upon all the writs and testimonies produced, the bonds in question were partly conditional, and partly for one and the same cause, *viz.* for granting confirmations to the feuars of their feus; and that the bonds can have no effect, nor belong to this donatar, till the condition be purified, and the cause performed; and, therefore, assoilyie the defender from this present process of declarator; but prejudice always to this donatar, upon performance and purifying of the conditions of the bonds, to pursue a new action of declarator, as accords.

After which, the pursuers having made their address to the advocate, who was then sick, and came not to the Session; he seemed to be extremely stumbled at the decision, and boasted, after the yule vacance, he would come to the house and show the Lords such invincible grounds for his Majesty's interest (which he said was horridly wounded and misregarded thereby,) that would make the Lords, if not alter, at least resume and demur on what they had done. But he was not so good as his word, and came not abroad all that Session; but, to supply his absence, and to do something, he wrote a letter to the Lords to reconsider the cause, in regard his opinion was contrary to their Lordships: and which magisterial way of dictating to the rest of the Lords, Sir George Lockhart hectors furiously in his informations. But however, the Lords complied so far with him, as to allow them a new hearing: wherein the pursuers insisted much to make it appear that the counter-obligements were not correspective nor real, and which is fully represented by us formerly; yet the Lords advised it of new, and adhered to their former interlocutor.

Sir George Lockhart, in his last information in this affair, was very bold and severe against the advocate, with whom only he hath the vanity seriously to contend, looking upon him alone as his equal, though he thinks him mightily crazed and bruized by his winter's fever. In the end of it he tells the Lords, that *desultatoria illa levitas* in fixing or altering interlocutors after full deliberation, were most derogatory to and a prostitution of their honour and Majesty. The Lords would judge thir expressions petulant and reflecting, and censure them in ordinary advocates; but they stand in some awe of him.

The pursuers were so much the more damped, that by their moyen they had flattered themselves a certain victory; and the Lords' deportment was so much the more commendable, that they held justice so fixed, where they had so great temptations to waver. Vide the decision *supra*, at the *8th of December* 1671, *Mr. Arthur Gordon* against *Laird of Drum*.

Advocates' MS. No. 377, *folio* 156.

1672. *December.* SIR JO. YOUNG of Leny against ISAAC BRAND.

IN the same month of December 1672, in a competition between Sir Jo. Young of Leny and Isaac Brand, baxter in the Canongate, about twenty-eight bolls of wheat, of the growth of the lands of Grothall, once appertaining to Mr. Jo. Smith, alleged sold by the said Mr. Jo. to the said Isaac, and who obtained a decreet against William Young, tenant of these lands, upon a pretended promise made by the said William to deliver the said bolls to him: this promise the

commissaries admitted to be proven by witnesses. And which twenty-eight bolls were also acclaimed by the said Sir Jo. as having best right thereto, because he stood infeft publicly in the said lands of Grothall near a year before the time of the said pretended sale or promise of delivery, and had also obtained a decreet against the tenant before the Sheriff for payment of his said farm to him. Both parties contending that the tenant behoved to deliver the bolls to them; and particularly Isaac Brand contending the tenant must answer him whether he be found liable to Lenie or not, seeing he had him personally bound to him, and he had followed his faith, and paid the price of the bolls to Mr. Jo. Smith, at the time of the tenant's promise, which otherwise he would not have done, and the tenant must blame himself for entering in any such agreement, seeing he therein followed the faith of Mr. Jo. his master as to any hazard he could incur thereby.

The Ordinary upon the bench inclined to sustain this against the tenant; but they having craved the Lords' answer, the Lords found that tenants should not be liable in double payment of their duties in the general, and that this tenant could not be bound by his promise to the said Isaac, *esto* he had made one, if so be it should *ex eventu* appear Sir Jo. Young had a better right to the said wheat than he or Mr. Jo. Smith his author had, who was then denuded in favours of Lenie; (though it is pretended the same was not then made public, but was a mere latent and clandestine right;) and, therefore, having secured the tenant, they ordained the parties competing to dispute which of them had best right.

Which interlocutor, as it was most just in itself, so it is most agreeable to the constant strain of former decisions, whereby the Lords have oft found, though tenants have given bond for their duties, either to their master, or to a third party, his creditors, at their master's order, and their master chance either to be denuded of the property, or a third party by arrestment or otherwise, to these duties, such bonds could not be obligatory against the tenants granters; which they granted allenarly *intuitu* of the duties they were owing, which being evicted *aliunde*, undoubtedly the bonds *ob cessantem causam* must also cease and fail.

In the debate betwixt the parties, it was OBJECTED, that Isaac Brand's decreet was intrinsically null, and the commissaries had committed iniquity in finding the tenant's promise probable by witnesses. ANSWERED, that it is true promises *et nuda pacta, quæ in nuda emissione verborum consistunt*, and so can only be interpreted according to the meaning of the parties who made them, are only probable *scripto vel juramento*, seeing they may be affected with qualities and conditions *quæ sub sensus non cadunt*, and so whereof witnesses may be ignorant; but here they were not in that case, but in the case of a *pactum ex incontinenti adjectum emptionis contractui*, and so was *pars contractus et sapiebat ejus naturam*, being accessory thereto, and as the bargain of sale is probable by witnesses, so is this promise depending thereon, and being a complex transaction, and consisting *in acto cadente sub sensum*, which might be very well known to witnesses and who have deponed already thereon, and against which there was then no reclamation, and so is competent and omitted. REPLIED, it is confessed, where a bargain is made between two, one sells and promises to deliver the victual, the other promises to pay the price; there, because the promise of delivery is in consequence of the bargain, it may be proven by witnesses: but here Mr. Jo. Smith sells the victual; a

third party, *viz.* the tenant, promises to deliver it, and not Mr. Jo.; certainly, though Mr. Jo.'s bargain be probable by witnesses, yet the tenant's promise (who made not the bargain, and is none of the principal parties contractors, but *tantum incidit in negotium,)* cannot be proven so. *Vide* 19*th November* 1679, *Lindsay* and *Crighton.*

I know not if this debate got any decision; but, in defence of the Commissaries' decreet, there is in the informations a late practique cited, wherein the Lords, in a case between one *Archibald* and *Syme,* found a promise to see a wright paid for some work wrought to a third party probable by witnesses, because it had a dependance and connexion with a contract of location, whereof it appeared to be a part; and which decision seems to meet this in hand very near. *Vide, supra, No.* 329, *in February* 1672; *infra, No.* 429, *in November* 1673, *Syme* against *Inglis.* *Advocates' MS. No.* 378, *folio* 158.

1672. *December.* MARGARET CLEILLAND AND JO. BOYDE, her Husband, against JAMES CLEILLAND of Faskein.

IN the same month of December 1672, was advised the action between Margaret Cleilland and Jo. Boyde, her spouse, against Ja. Cleilland of Faskein, wherein the case was: Ja. Cleilland of Glenhove, being descended of the family of Faskein, and having no children of his own body, resolved to return his estate back to that family; and in pursuance thereof, did, in July 1666, dispone the same to this Faskein, reserving his own and his wife's liferent; whereon he was publicly infeft; and the disponer lived two years and a half after the said disposition; only it seems being troubled with a goutish humour in his feet, he was not able to go freely to kirk and market, for validating the said disposition. Whereupon Margaret Cleilland, his sister, and apparent heir, and her said spouse, intents a reduction of the said disposition, *ex capite lecti,* in so far as before the making thereof he had contracted the sickness whereof he died, and after the same did never recover, nor go to kirk and market.

ALLEGED for Faskein,—He opponed his disposition, and offered to prove several most pregnant qualifications of health in him after the same. REPLIED,—That his not going to kirk and market was a sufficient presumption of sickness: and besides offered to prove sundry presumptive qualifications of sickness. The Lords, before answer, ordained a joint probation, and witnesses to be examined *hinc inde* for both parties, for clearing in what condition the defunct was, the time of granting the said disposition, if *in statu morboso nec ne,* and if sick of the disease whereof he thereafter died; and whether he went abroad about his affairs thereafter, or went to kirk and market, and in what manner, and what other equivalent acts he did.

Probation being mutually led, the Lords found the reason of reduction and pursuer's reply proven, *viz.* that he was sick of the disease whereof he died, at and before the disposition; and that his going to kirk and market was but fictitious *et animo circumveniendi legis mentem,* seeing he went supported, and with many circumstances of infirmity: and that no equivalent acts were proven save what

were performed and transacted *intra privatos parietes*, and which any diseased man might do; and the probation whereof was mighty suspicious, depending only upon *domesticum testimonium;* and that there would be few dispositions on death-bed reduced, if such acts were sustained as sufficient to validate:—and, therefore, did reduce the disposition.

The justness of which decision was much questioned by many judicious persons, upon thir grounds; that it was proven, and notourly known to all that country where the defunct lived, that the time of the subscribing of the said disposition, he was as sound in memory and judgment as ever he had been, and was in the same condition of health he had been in by the space of seven years of before, viz. only troubled with the gout in his feet, by which he was unable either to go or ride, unless it had been to walk out to his yards or wood, about half a mile from his house, and come back again, and which he did frequently after the said disposition; and that he continued in the very same *liege poustie* by the space of a year and a half after the said disposition, and never contracted the fever whereof he died, till about a fourteen days before he died; and that, abstracting from that infirmity in his legs, he was in most perfect health till that fortnight; that an indisposition in that organ cannot in reason be looked upon as a sickness, after which parties cannot make a rational settlement of their fortunes; and it seems hard, and against the sense of that old law in *R. Majestatem*, that such an infirmity, which is not *impedimentum rebus agendis*, should make one be reputed *æger et in lecto*, seeing he can perform all deeds that lame persons can. That this were to lay a most dangerous foundation of quarrelling the most part of the rights in Scotland, and unsecuring the whole lieges, if people, blind, lame, or goutish, so that they cannot walk without help, though otherwise of undoubted health, could not dispose upon their effects: And how many persons would be found to fall under the compass thereof! That he lived two years and a half after it: that no acts of health can be condescended upon as exercised by him for seven years before, which he did not with the same vigour after the disposition constantly till a fortnight before his death: that all that time there was a constant and uniform tenor of health observable in him; that he ate, drank, slept, and rose early, like a whole man, overlooked his husbandry, counted with his tenants, sold his woods, transacted debts, agreed neighbours at variance; conversed with and entertained the gentlemen about and strangers when they came to see him, was merry with them, and was the last of the company who wearied, he making them drink sometimes to excess, and he not touched, so robust a constitution had he; walked up and down his house with them unsupported, conveyed them to their horses through his close; went and played at the pennystone, and lifted it himself, played four games, and then went to the change-house, and all unsupported; that he went out to the adjacent croft, and gave Faskin seasine *propriis manibus;* that being a cadet of that family, and having no issue, he made a most just election to devolve it unto that channel whence it issued; and *esto* he had been furious as Tuditeinus was when he made his testament, though this infirmity of the gout hath nothing common with it, yet the Lords should imitate the centumviri, who sustained his said testament, because they found nothing of madness in it, *magis quid scriptum esset in tabulis quam quis eas scripsisset considerandum existimantes*, as Valerius Maximus excellently expresses it, *lib.* 7. *memorabilium, cap.* 8*vo.;* that it was proven he went to Cumbernald kirk, and

bought ribbons and tobacco from a chopman there; and though he was carried to the church, yet he walked more than ten pair of boots freely of himself; and that Craig the doctor, who seems only to depone the contrary, is suspect, and received only *cum nota*. All which could not but amount to prove the disponer to have been in perfect health, both of body and intellectuals, (excepting the gout in his feet) the time he granted the same, and long after: and to stretch the law of death-bed to such deeds as this, which fully satisfies the intent of the law, will open a gap for subverting the security of the lieges. Notwithstanding of all which the Lords reduced *ut supra*. The incentives were Faskin, who had got the disposition, was popish, and this Boyde, who had married the heir, was a minister. Likewise the Lords had the cases of *Balmerino* and *Couper*, *Pargillis* and *Pargillis*, and *Sir Robert Richardson* against *Sir Jo. Sinclar*, marked by Dury, 30th July 1635, before their eyes. *Vide supra* [*20th Feb.* 1670,] *Balmerino's case; item Pargillis: vide infra in December* 1677, *Lockhart*, [*No.* 677.]

Faskin and his procurators made a great clamour at the decision, and represented things so to several of the Lords, that it was thought if the president had but suffered it to pass to a vote again he would have been assoilyied; sundry of the Lords who had not pondered the consequence of the preparative, now forethinking what they had done; which repentance had this effect, that after the pursuers had extracted their decreet, they forced them (which was scarce legal) to consign it in Colinton's hand, and he was recommended to settle them: and the pursuers, notwithstanding of their decreet, were glad to transact it, and give Faskein some part of the estate.

And the truth is, the interlocutor seems to be founded on very strict law, without any allay of equity. *Advocates' MS. No.* 379, *folio* 159.

1672. *December.* The MAGISTRATES of INVERNES *against* JOHN FORBES of CULLODIN, WILLIAM ROBERTSONE of INCHES, and OTHERS.

IN the same month of December, 1672, was advised the debate betwixt the Magistrates of the town of Invernes, and John Forbes of Cullodin, Mr. William Robertsone of Inches, and the other heritors and feuars of the mills of Invernes; betwixt whom there were two actions depending. The first was this. *In anno* 1671, the procurator-fiscal of Invernes obtained a decreet against the feuars of their town's mill, belonging to Cullodin, Inches, and other feuars, before the Dean of Guild of Invernes, whereby the Dean of Guild, after trial taken of the measures, viz. firlot, peck, and lippy, used at the said mill for receiving their multure and knaveship, he found the same false and unjust, and greater than the Lithgow measure used in the town, and established by law and act of Parliament through the hail kingdom, and therefore fined the millers each in L.100. Of this decreet, the feuars, their masters, raised suspension and reduction on thir grounds: *1mo*, That the said decreet was null, as given *a non suo judice*, the Dean of Guild being judge only to measures between burgesses within burgh, and not to measures without burgh used in the mills feued by them. *2do*, It is most unjust, because the 114th act, Parliament 11, James VI. (which is the only act

by which he walked, and which ordains all measures to be reduced and broken to the Lithgow measure,) was no ground or warrant for the decreet; in so far as the said act regulates only market mets and measures for buying and selling, and noways concerns measures in mills; yea it bears an express reservation, that the said determination of the quantity of measures should be without prejudice to any persons who are founded, infeft, or addebted by tack or contract for victual or farms of any other measure: the same quantity shall remain with giver or receiver, so that measures whereby masters receive their farms, or heritors of mills and their service, their multure duties, (which in effect is their farm or rent,) are not comprehended. (*Vide* Dury, *March* 9, 1622, *Laird of Barnes.*) 3*tio*, The said decreet is yet most unjust, because the Dean of Guild did neither observe the meaning of that act of James VI. nor the form and method prescribed for the settling of measures by the 38th act of his majesty's first Parliament in 1661, by which all he is authorised to do was to report the disconformity he found in the said mets with the usual measures of the country to the secret council. 4*to*, The feuars being infeft in the mill, with the multures used and wont; it is offered to be proven, that thir measures now controverted (which resolves mainly on the quantity of the knaveship) are the same which they and their predecessors have been in possession of past all memory, and which is sufficient to fix the quantity and justify the exaction of the same in all time coming.

To the which reasons it was ANSWERED, 1*mo*, That thir suspenders could never call the Dean of Guild's jurisdiction and competency in question, because, before pronouncing of that decreet they had compeared and proponed this defence, that these measures were marked by himself. 2*do*, The mills being a part of the town's property, and feued by them, to be holden of themselves; the feuers, and who also are all burgesses, cannot be heard to decline them. As to the second and third reasons, whatever privilege and reservation there is in favours of heritors for their farms, there is neither sense nor reason why that should be indulged to heritors of mills; but, on the contrary, their measures in all justice [ought] to be conform to the set standard, else the slavery of astriction may be made much more intolerable than it is already; *et odiosa sunt restringenda.* To the fourth, answers, that the town offers to prove interrupted.

The Lords having considered this debate, and finding the hinge of the whole controversy turned on the single point of the lippie or muttie, which is the measure by which the knaveship is received and paid, (for neither party controverted the quantity of the multure, but acknowledged it to be a peck of two bolls;) which the town alleged was only the fourth part of a peck, and called it a lippie; and the feuars contended it was the third part of a peck, and which was termed a muttie, (it may be from the French *moietie,*) and which they had immemorially so uplifted and possessed; the Lords, before answer, ordained the said feuars to prove their possession of the said muttie at the third part of a peck, by the space of forty years, and the town to prove their interruptions, and that the said lippie ought only to be the fourth part of a peck, either by writ or witnesses.

Probation having been led accordingly, and coming to be advised by the Lords, it was ALLEGED for the town, that they had clearly astructed the said lippie ought and was no more but the fourth part, 1*mo*, By a judicial act betwixt the feuars of the said mill and the town in 1613, declaring and determining the knaveship at the fourth part; and which is a fundamental settlement, and cannot be loosed

without endless plea. *2do*, By a decreet of the Lords *in foro* in 1637, wherein Inches, one of the feuers, pursued Cuthbert of Draikies for abstractions; and in which action, conform to probation led by the pursuer, the Lords decerned the lippie to be the fourth part. *3tio*, By decreet of the dean of guild of Invernes, in 1664, whereby he broke and burnt their mutty, because it was more than the fourth part. *4to*, By a decreet arbitral in 1664, pronounced by my Lord Brodie and Sir G. Monro, wherein they decern the duties to be paid according to former acts, decreets, and sentences; which can be no other than those in 1613, 1637, and 1664. *5to*, Any possession the feuers have had of a greater quantity, can give them no right, being most unjust and exorbitant, and different from the customs of all other mills, and nothing save an usurpation *clam vi vel precario*, or by inadvertence of the townsmen, or extorted these thirty years past, the heritors of the mill having been either provosts or bailies of Invernes; or occasioned by the troubles which have harassed the whole kingdom since 1637. *6to*, No immemorial possession can prescribe the said quantity at a third part, because the contrary being clearly determined by the act 1613 and decreet 1637, they were *in mala fide* to exact any more; and so, without *bona fides* or a title, no prescription can run. *7mo*, The feuers' witnesses are most suspect; for *1mo*, one of them is received *cum nota*, being Insches' tenant; *2do*, the rest are obscure fellows, and highlandmen, and tenants to Cullodin's brother-in-law, and so not *omni exceptione majores*; *3tio*, they must prove forty years possession before 1664; and if any hath deponed so, it is desired the Lords may consider how it can be in nature, one of them being but fifty-one, and the oldest but fifty-eight.

Whereunto it was REPLIED for the feuers,—To the *first*, The act 1613 is no interruption; because neither agreed nor consented to by the heritors of the mill for the time, being only subscribed by the town clerk and two notaries, not bearing any command they had to subscribe for the feuers, and who were persons who could write; and, therefore, the notary's assertion can neither bind presence nor consent on them. *2do*, As they did not consent to that act, so they have ever uplifted the mutty at the third part since syne. As to the *second*, the decreet in 1637, it cannot be reputed or looked upon as a settling of the quantity of the knaveship, that not being in the least controverted there; only the Lords, in the decernature, not understanding the term *muttie*, did *obiter* express it by a more known term of a lippie; and, notwithstanding of that mistake, Draikies (who knew it to be such,) ever paid the muttie since. *2do*, That decreet was at the instance only of one of the feuers, who neither did nor could prejudge the rest. As to the *third*, no respect can be had thereto, because whatever power he had by acts of Parliament to reduce the measures, yet he could not diminish the quantity of the knaveship, whereof the feuers were in possession; and his decreet, in so far, was most unjust and absurd. As to the *fourth*, the said decreet is reponed and retorted. As to the *fifth* and *sixth*, the quantity of multure and knaveship is either specially constituted by infeftments, decreets, and acts of court, or otherwise the same is general and undetermined,—the abstracted multures and knaveship used and wont; and there is nothing more certain than, where the quantity is general and undetermined, but constant possession rules the same; and which, as it is a sufficient evidence to determine the quantity in all mills, so much more in the king's mills, (of which this is one, and though the feuers hold it of the town

feu, yet the town holds it of the king,) where possession is sustained not only to clear the quantity, but even to constitute the very thirlage, and which use and wont in his Majesty's mill they neither ought nor could have altered or interrupted. To the *seventh*, their witnesses are most famous, and one of them is only tenant to Inches' mother, and liferentrix; and for the rest refers to the depositions.

The Lords found the feuers' allegeance of immemorial possession of the muttie at the third part of a peck sufficiently proven, and found the interruptions used by the town not sufficiently instructed; and, therefore, declared the said muttie, in all time coming, to be the third part of a peck, and allowed the same, *interdicto uti possidetis*. *Advocates' MS. No.* 380, *folio* 159.

[*See the following case, the other action betwixt thir parties.*]

1672. MAGISTRATES of INVERNES *against* JOHN FORBES of CULLODIN, WILLIAM ROBERTSONE of INCHES, and OTHERS.

THE other action that was ventilated betwixt these parties this same winter, was upon this occasion. For maintaining the former plea, [see the preceding case,] about the muttie, the Magistrates of Invernes lay on a *stent on the whole* burgesses of the town, and in particular upon Cullodin, Inches, and the other feuars of their mills. The said feuars raised a suspension thereof upon thir grounds: that the said town, by their intolerable and arbitrary way of stenting, had uplifted from their vassals and feuars more than eight-score a month's cess, since his Majesty's restitution; and that the present stent was for prosecuting a most unjust law-suit against their selves, and to which they ought not to contribute, and that they saw no end of such unwarrantable exactions; and that in the manner of imposing it they had grossly contravened the rules of stenting prescribed by the Lords of Session in a former decreet *in foro* betwixt thir same parties; and that the said stent was most unnecessary, yea unjust, as to the causes of it, and most unequal, exorbitant, and partial, as to the adjusting and laying on of the several proportions. (*Vide supra, 9th July* 1670, *Magistrates of Montrose* against *Scots, No.* 70.) That being only feuars and vassals, and having no trade or commerce within the town, they cannot be liable to any stents imposed by the town's private authority, but only to those laid on by authority of Parliament or conventions of estate; and particularly could bear no part of their minister's stipend, they being heritors of the land-ward parish, and paying their proportions for their lands. Likeas they had raised a declarator, craving to have it found and declared, in so far as concerns their lands holden feu of the town for payment of a feu-duty, with this clause, *pro omni alio onere*, they are not subject or liable to be stented with the town in any of their private stents, but only such as are imposed by public authority, and whereunto the other heritors of the kingdom are liable: else royal burghs at their pleasure shall exhaust the property of their feuars' lands, and by their insupportable and reiterated taxes, and unequal proportioning, render them of no advantage to the feuars; and which is the very malicious design of the burgh of Invernes: because the feuars will not comply with all their unreasonable demands, they, out of resent-

ment, do constantly impose most intolerable stents, to force them to abandon and give up their property; and which will very effectually work their end, and make their feus altogether unprofitable to them, if they once be made subject to this their unlimited and uncontrollable power of stenting them; and which is a most gross and insolent extortion and oppression in them, and deserving a rectification for preventing the preparative.

Unto which reasons of suspension, and conclusion of declarator, it was ANSWERED,—That they opponed the decreet in 1664, wherein, after a most contentious debate, the Lords found Cullodin liable to bear a share of their private stents imposed for the necessary use of the burgh; and that in all stents imposed since that decreet, they have exactly followed the way prescribed therein; that the inequality could not be complained of, the same having been laid on by sworn stent-masters, of which number some of thir suspenders have been; and that they have paid their proportions of this very stent suspended, and which proportions amounted to a very inconsiderable thing,—Cullodin's being only L.4 Scots; that the causes of it were very just, their commonty being riven out and abused by thir feuars, and the common good of the town being so small and drained as was not able to maintain their pursuits; that it was noways presumable that the magistrates and Council, who bear burden as well as the rest of the inhabitants, would unnecessarily clog themselves with stents, only to be revenged on three men.

REPLIED,—That the excellent, just, and rational method set down by the Lords, in their decreet 1664, for imposing stents, was not in one point of it observed: in so far as it ordains, that before the town or Council impose any stent, there should be public intimation by touck of drum, to the whole inhabitants and others concerned to compear; and that they expound and declare to them the grounds of the stenting, and the necessity thereof; and to hear and satisfy the inhabitants their objections against the same; that they shall exhibit the books of their common good, and make it appear to all that it was exhausted and spent to the town's use, and not able to defray any of the just grounds of the present stenting; that the inhabitants shall see the stent-masters sworn; and that the roll of the stent shall lie in the clerk's hands four days after its finishing, and parties be admitted to see it, and heard to object against their inequality, &c. That it was a gross mistake to think the royal burghs had the power of stenting for their private use, as an act of jurisdiction; for from the common law, both D. and C. de *Vectigalibus*, it is most clear cities have no such power; and so Craig, *tit. de Regal.*, affirms the power of stenting, or imposing taxations, is only competent to supreme princes, *qui non recognoscunt superiorem*; yea by acts of Parliament none can impose taxes but King and Parliament, and the stents permitted to burghs, called in law, *collectæ et contributiones*, are merely founded in the acquiescence and consent of the burgesses concerned. But not one jot of this was observed. Was intimation made by touck of drum, *re integra*?—not at all; but, *ex post facto et dicis causa*, sent them through when the stent was imposed; no reasons expounded, no satisfaction given to the citizens' scruples, no probation that the common good was exhausted and unable, no access to the clerk's books, no redress to be had of exorbitancy..

Vide infra Town of Aberdene and some of the *Burgesses*, in *January*, 1678. See *John Boswell's decreet* against *the Town of Kirkcaldy*, in 1669, for overstenting him.

The Lords, before answer to the debate upon the suspension, ordained probation to be led by either party of the way and manner the town had used in the imposing of this last stent, to the effect they might by comparison find whether they had followed these just rules prescribed them in that their decreet.

I may imagine the town had neglected their pattern: but the declarator was the main business against it. They ALLEGED, 1*mo*, That it was *res hactenus judicata*, and they could never reclaim now; seeing by the decreet 1664, the feuars were found liable to contribute with the town in their private stents. 2*do*, They cannot be otherwise, because by the express quality of their feus they must be burgesses and inhabitants of their burgh, and their heirs must be burgesses and actual residenters within the burgh; secluding their wives and assignees, and their heirs female, and also their heirs male, who shall not be burgesses and dwell within their town and territory: and which qualities are also annexed to the hail feus of the burgh of Aberdeen, and accordingly, their feuars bear burden with them in all their private stents; but *ita est* thir persons, who are the towns feuars, are all burgesses and residenters within their town or territory, and consequently *qua* burgesses must be liable. That by the 276 act, James VI. in 1597, magistrates are allowed to stent all burgesses, &c.

ANSWERED,—That they could be in no other or worse condition than the other Burghs Royal their feuars, such as Edinburgh and the whole other Burghs, who acknowledged no private stents; and that they had bought their feu *lands* very dear, and at the full avail, and could not be more enslaved than tenants or tacksmen, who are not subject to the private stents of their masters and heritors.

REPLIED,—There was a speciality here, viz. the inherent and innate condition and quality of their feus, that they could only belong to burgesses; which made them in a different case from the feus of other towns, and bound their stents upon the feuars. 2*do*, Thir feued lands being a part of the forest of Draikies, are such as were originally given by his Majesty to the Burgh at its erection, and *intuitu* whereof they being the seventh Burgh are very high in the Burgh-tax rolls; and are holden by them burgage of his Majesty, their charter of it bearing *firmas burgales;* and so being holden burgage, are the proper subject of stenting.

DUPLIED,—That the restriction of these feus to burgesses imports nothing; for that was only to seclude clanned persons and Highlandmen: and I cannot see if the same were comprised by a stranger, or an heir retour himself in special to his predecessor, who neither of them were burgesses, how the town could refuse to infeft and receive them upon a charge: or if one of them now should renounce his burgess-ticket, it were ridiculous to think he had thereby lost his feu; seeing it was only a personal quality, and could not really affect the feu to make it liable to stents, which *de sui natura* is free. And that lately in a debate between *Kirkcaldy* and *Jo. Boswell*, the Lords found Jo. not liable in their private stents nor stipend, &c. *Vide Craig de feudo burgagio, pag.* 60, 68, and 281. That the charter of Draikies' forest, in 1591, bears a clear feu *reddendo*, L.36 of money, *nomine feudi firmæ;* and that the town's feus of that forest have nothing common with burgage holding, seeing the feuars entered never by the bailies, as the king's bailies or commissioners within burgh, as is done in burgage, but entered by the town as their superiors, and paid compositions. That they grossly impinge upon the principles of law, by confounding that which is holden in burgage and that which is holden

feu. In the first the king is only superior; in the second the town itself; and therefore, in the first, the bailies giving infeftment is not an act of a superior, but *nudi ministri*. 2*do*, In burgage they neither do nor can exact any composition for entering vassals, or other casualities, but in feu holdings they do. 3*tio*, Not one foot of burgage ever was or can be conveyed by a base or subaltern infeftment, but all summarily by resignations; but their feus may be subfeued, and require a charter. All which are clear demonstrations and convictions how downright an error it is in law to think thir feus are held by burgage, to draw in the feuars under the verge of their most abitrary stents; they being given out for payment of a feu-duty *pro omni alio onere*, and that for the full price, and so made the feuars' absolute property.

See this point very learnedly prosecuted in the informations; but it may be added, which is not informed, that there is no speciality in their tying their feus to the heirs male and to burgesses, seeing the feus of the town of Edinburgh's common burgh moor are let out with the same quality, and yet it is never once attempted to burden them with any stents imposed by the town's own private authority; and in those that are laid on by the Parliament, they go in with the shire of Lothian and not with the town; whereas thir feuars do not once reclaim against their stenting with the town of Invernes in the public taxations. See Hope's *Minor Practiques*, Tit. Of the Jurisdiction of Sheriffs, Burghs, &c. *Vide supra*, No. 284, [*Duff* against *Forbes*, 5th December 1671.] See the town of Edinburgh's statutes, *anno* .

TRIPLIED,—That it is denied the town could be compelled to receive an heir, compriser, or other singular successor, who was not a burgess, and that one renouncing his burgesship could retain the said feu unless he offered scoting, loting, watching, and warding with the neighbours; likeas the town of Invernes offered them to prove, that, in all the private stents that have been imposed within their burgh these forty years, and past all memory, their feuars did ever bear burden with them as a part of the town.

The Lords inclined to find the feuars, in the common strain of law, not liable to their private stents, yet laid hold upon this last allegeance of immemorial possession of their being stented with the rest of the burgh; and, therefore, before answer, ordained them to prove the said perpetual custom, and allowed the feuars to condescend on and prove their interruptions and reclamations against the same.

As the feuars proving the immemorial possession of the muttie at such a quantity gained them the former cause, though the quantity proven was disconform to the custom used in the rest of the mills of the kingdom, so here it is feared they be overtaken on the same head, and get on the finger-ends with the same measure they did met to others; and the town proving them and their authors to have been in constant use of being stented when the town was stented, (though the said custom quadrates with none of the feus of other burghs-royal in Scotland,) yet that shall be sufficient to wreath this slavery of being subject to their stents irrecoverably about their necks.

The probation adduced by either party upon the possession and interuptions is not yet advised. *Advocates' MS. No.* 381, *folio*. 161.

1671 and 1672. MR. JOHN STEWART of Kettleston, *against* The LAIRD of KIRKHILL.

1671, *July.*—IN the action pursued by Mr. John Stewart of Kettleston, against his nephew, the Laird of Kirkhill, upon a bond of provision for 3000 merks *per annum*, granted to him, during all the days and years of his lifetime, by Sir Lewis, his father, to which Sir Lues the defender is heir by progress; they had no other defence but to offer to improve the bond as false; at least to seek the same reduced, as subscribed by circumvention, or impetrate at some time when Sir Lues has been overtaken in drink. The adminicles against it were, that Sir Lues was too rational a man to do a deed so destructive to his heir and representative as this is; that Mr. John, the pursuer, was more than competently provided *aliunde* without this; (he got 10,000 merks and upwards from his father;) that the same is 22 years old, and never made known till now; that in the many dealings, counts and reckonings, and pursuits, that intervened betwixt this pursuer and the defender's father, his brother, there was never so much as one mum heard of this bond all that while, and yet there were many proper occasions offered for founding allegeances or defences thereon; (at all other times he is designed Sir Lues in this 'Sir Lodovick;') it was never made a ground of compensation, which, in law, tacitly and presumptively infers a discharge *inter propinquos, per legem* 26. *D. de probationibus.* But that which is most concluding is, they find the late Earl of Southesk a witness in the bond, and one John Carnegie, designed servitor to the Earl of Southesk, is writer thereof. They have got of the handwritings of all the Carnegies that were servants to the said Earl either six years before, or six years after the date of the bond; (so that there can be none condescended upon of whom they have not letters, bonds, counts, or other writs, all written with their hand;) and yet none of them agree with the handwrit of this bond, but differ therefrom *toto cœlo.* In the submissions and claims of all that could be asked *hinc inde*, this was never an article. When first shown it was most white and tight, the next time it was all sullied, rankled, and torn. All the Carnegies living are examined, and deny it to be their handwriting.—*Quæritur*, if this narrow point will be a sufficient warrant in law for authorizing the Lords to find the said bond null, for one man may have two or three most different ways of writing.

Advocates' MS. No. 229, *folio* 106.

1672. *February 7th.*—IN the pursuit mentioned *supra*, at No. 229, betwixt Ketleston and his nephew, the Lords, after a long debate, found Ketleston was not obliged to condescend farther upon the writer of the bond whereon he pursues, than the bond does, designing him servitor to the Earl of Southesk; and find the 80th [175th] Act of Parliament, *in anno* 1579 [1593,] sufficiently satisfied by the designation made in the bond; and therefore that the improver must now condescend: and they closed the direct manner of improbation; and assigned Strabrock the 26th of this month to prove that there was none of the name of John Carnegie, in the year 1652, servitors to Southesk, who could write a bond, or whole context of a writ as this is. Which though it seems a negative, and so may not be proven, yet it is that which the doctors call *negatio pregnans*, being circumstantiated both *quoad locum et tempus.* See the information of it. *Vide Tractatus*

duos de probanda negativa, apud me, Herculani et Martini a Fano. *Vide infra, Nov.* 1676, *No.* 508, § 5. *Advocates' MS. No.* 319, *folio* 128.

December.—In the same month of December 1672, did the Lords advise the indirect articles of improbation, mentioned *supra,* Nis 319 and 229, pursued by Sir William Stuart of (Kirkhill) Strabrock, against the Heirs of Mr. John Stuart of Ketleston, his uncle, of the bond there mentioned; and did find the said articles either not relevant or not proven, and therefore assoilyied from the improbation, and decerned Kirkhill, the defender, to pay the sums contained in the said bond.

Which decreet would have done much to have broken him, had not two things happily concurred for his liberation. The first was, that, finding his uncle was year and day at the horn, he (by the moyen of my Lord Kincairne, who procured a letter from the king for passing it in Exchequer,) took the gift of Ketleston's liferent escheat, without any backbond exacted for being countable to Ketleston's creditors or Exchequer, whereby he got absolute right to the said bond pursued on, and decreet, as falling under his liferent escheat; yea, with a high hand, his whole estate was carried away, to the disappointment of his creditors of their payment, and the frustrating of his relict and children of their subsistence and livelihood; a very hard preparative, seeing new methods of confiscation ought to be restricted and not invented: and it was hoped the Lords would not declare it without a backbond. (*Vide supra, No.* 307, *My Lord Halton's case,* [*July* 1671.] The second was this: Sir J. Cunyghame having occasion to see the style-book of a writer young man called Patrick Falconer, he, as one of Kirkhill's procurators, remembering the handwrite of that bond which they had offered to improve, fell immediately in a strong fancy that the handwrites were all one, and he who had written that style-book behoved likewise to be the writer of that bond: which setting him upon a more narrow scrutiny and comparison, he found them all one. Which having been represented to the Lords, they called for the said Patrick, and showed him the bond. He immediately, in all their presences, owned that the whole body of that bond was written with his hand; and that he remembered about three years ago, the Lady Ketleston, who is his near relation, sent for him, and caused him secretly copy the said bond off a principal, which she gave him, as he thought, and which he did all to the subscriptions, and then returned it to her: that he never saw it since, and that this bond, now used by them, and produced to him, is the very same he copied at her desire. Which is a most grievous stain upon the said lady, and loads the memory of her husband; though she utterly denies this to be that which he copied, and that she gave that copy to the defender and his curators, who were desiring a sight of it, not judging it fitting to intrust them with the principal. I heard oft that Ketleston ever offered up this bond to his nephew, if so be he would marry one of his daughters.

Advocates' MS. No. 382, *folio* 162.

1672. *December.* Sir Wm. Fleming, Commissary of Glasgow, *against* Mr. Wm. Nimmo, Commissary Clerk.

About this same time, there was managed with great heat, an improbation pursued by Sir William Fleming, Commissary of Glasgow, against Mr. William

Nimmo, sometime Commissary Clerk there; wherein the case was; the Commissary Clerk being addebted in a small sum of money to Sir William, Sir William pursues him for the same: wherein Nimmo alleged it was paid and discharged, but the discharge had miscarried, and therefore referred the truth of his allegeance to the Commissary's oath; who swore *positive*, it was yet owing. Nimmo in all companies did not stick to assert the Commissary had perjured himself; whereupon the Commissary cites him before the secret council for a defamer and slanderer; there he offers to verify it, and so could not be punished, and produces a discharge of that debt under the Commissary's own hand before his oath. The Commissary storms and offers to improve it as false. The Council sends them to the Judge-Ordinary. There are two witnesses at it; the one of them Sir William's man, who being examined by the Lords, denies his subscription; the other, Mr. Nimmo's man, upon oath, astructed the truth of the subscription.

The Lords, by a kind of trysting interlocutor, assoilyied both parties *hinc inde*, the one from falsehood, and the other from calumny; only found the discharge null, and therefore ordained Mr. Nimmo to pay the sum sworn by the Commissary to be owing: which seems very contradictory. It was thought by many the discharge was a true deed, and though the Commissary was a person of integrity and honour, (which was the great cause of the Lords their decision,) yet it was wondered how he forgot it so soon, seeing *probabilis oblivio in facto proprio recenti non cadit.* This interlocutor may seem strange, *quia inter verum et falsum non datur medium.* See 15*th December* 1680, *Arbuthnot of Knox.*

Advocates' MS. No. 383, *folio* 162.

1672. *December.* SIR JO. HENDERSONE of Fordell *against* MR. ROBERT WEYMES of Cuthlehill.

IN the same month of December, 1672, was debated the declarator raised by Sir Jo. Hendersone of Fordell against Mr. Robert Weymes of Cuthlehill, to hear and see it found and declared that he and his predecessors had for the space of forty years and upwards, been in possession of the harbour of Aberdour, and of a high way leading through the said Mr. Robert's lands of Cuthlehill, for driving their coals to the said harbour from their coalheughs; as also, had right to the said highway and passage, and had accordingly carried their corns and other goods to the said harbour, and exported and imported thereat as the usual harbour and port of that place, till they were wrongously debarred from the use thereof by the said Mr. Robert; and with the which declarator, the Earl of Murray, towns of Innerkeythin and Aberdour, and neighbouring heritors, did concur.

ALLEGED,—That the defender being heritor of the lands of Cuthlehill, within which both the said burn-mouth, called by the pursuers a harbour, and the said way leading thereto, were locally situated, he was founded *in jure communi* to impede and interrupt all others from passing through or using his property, unless the pursuers had a sufficient right in their persons to the said way or harbour, either by the formal constitution of a servitude, by a contract clad with possession, or

by the equivalent prescription, which are the only two ways for establishing servitudes in our law. *2do*, Any possession the pursuers can allege upon is not sufficient for prescription, because without any title; as also the defender offers to prove interrupted both *via facti et juris*. *3tio*, Fordell has acknowledged the pursuer's right, by accepting a tolerance some five years ago from this defender's authors, for driving his coals that way; which is a clear demonstration that Fordell had no right else, seeing the taking of that tolerance is inconsistent by our law with his having a right *jure proprio*; and which tolerance can never give him right either to way or harboury, or sustain this declarator, because his author was long before inhibited, and denuded of his right; however it will import against the pursuer an acknowledgment he had no right.

REPLIED, *1mo*, The harbour being a common port, resorted to by all the country with their goods, in order to export and import, and so used by them past memory, and having no other so commodious, they must consequently, of all necessity, have right of a passage to it: *concesso consequente conceditur et antecedens, l. 2. D. de jurisdictione*. *2do*, Their declarator is founded in law, viz. the 53d act Queen Mary, Parliament 1555, and act 156 in 1592: where all high ways and passages leading to sea-ports, &c. are commanded to be inviolably observed; and that none interrupt the Burghs or other lieges in their going or passing, under the pain of oppression; which is directly the case of the way and harbour craved to be declared, it leading both from Innerkeythin and Aberdour to the said harbour. *3tio*, Offers to prove immemorial possession beyond the defender's interruptions, they being but recent and unjust, *via facti*, and contrary to the said acts of Parliament. *4to*, Any tolerance Fordell took was only on thir terms, that this defender's authors should not trouble him or his tenants in their right of driving that way; which was a clear acknowledgment that Fordell had right.

DUPLIED,—That the pursuers take that for granted which is in itself most false, viz. that it is a public harboury; for that being laid down for a ground, certainly a way leading to it must be granted: but there is nothing like a public haven here; for a public port, by its natural signification is a public and open station, free and patent, by immemorial possession, to all who please to make use of them; and by Justinian, or rather Tribonian, par. *2do Instit. de Rerum divisione et acq. r. d.* are reckoned *inter ea quæ sunt juris publici*, that is *quarum proprietas quidem est populi, usus vero omnium communis, nempe ex eo populo: (vide* Sixtium *de Regalibus; et* Craig, peg.) and by the feudal law and ours are placed *inter regalia*, so that with us, he in whose lands they are, hath ever an express disposition of them from his Majesty; and they who have the privileges of a harbour, have it ever specially designed in their infeftments, and get a charter from his Majesty erecting such a place in a port. Likeas Ulpian *l.* 59. *D. de V. significatione* defines a port thus, *Est locus conclusus et tutus, quo importantur merces et inde exportantur, et ut ibi naves a procellarum impetu defendantur:* * none of all which agrees to this burn-mouth, which is *statio maxime privata*, and any face it may seem to have of a harbour is only some few stones tumultuarly and indigestly gathered together by the industry of the heritors of that land, for their

* Yet Suedivin, *ad prædictum par.* interprets that law, *non de portu in mari sed de domo seu cellario conclusa.*

own private use and exportation of their own coal; likeas the land on both sides of the said burn-mouth belongs to the defender, down to the very flood-mark, and never looked upon as public harbour, nor used promiscuously or uncontrovertedly by others; but on the contrary, the defender's authors did ever debar the sailors of Aberdour from coming in there, till they were glad to enter in an agreement with him in 1656, and pay him licence money; and which contract was entered into by one Tod, a sagacious fellow, and who bought and cawed Fordell's own coals, and knew well he had no right to defend him, and therefore transacted with the defender's authors for the said way and harbour; and whom Fordell would have maintained if he had had any right as he now pretends, seeing by freeing him of that, the said Tod would have paid him more for his coal. *2do*, There is no high way here, but a mere foot road made by the pursuer's authors through their own property, for their own private uses; and by ocular inspection, in many places, is not three feet broad, as appears by a dike that hath hemmed it in on either side; and on both sides has lately been tilled: so that it is so far from being *via publica regia consularis basilica vicinalis* or *prætoria*, that it is most improperly called *via privata* and *agraria* or *via* at all; it scarce being *servitus actus*, and at most but *iter* for a horse with a load on its back, for *vehiculum* or a cart cannot pass it, it is so narrow. Likeas the law, (so also defines our 8th act of Parliament, 1617, article 8.) defines the latitude of a way to be *octo pedes in porrectum et sexdecim in anfractum:* nothing of which can be observed here. And Cæpolla, *tractatu de servitutibus, Tit.* 3. *de servitute viæ, No.* 17, *pag.* 268, defines *via publica*, to be *cujus solum est publicum, item*, to be *certum solum limitatum directum certis finibus latitudinis publicatum per principem, pro usu publico meandi vel eundi*; none of which quadrates here; yea, there he affirms it is not a proving consequence to say, Publicly all have gone and passed such a way for a long space of time; *ergo*, it is a public way: for it must also be so reputed by all, and must end in a public place: which are not to be found here, neither the *terminus a quo* nor *ad quem* nor *medium* being public, as it ought to be in a public way. See *Tit. Institutionibus et D. de servitutibus prædiorum rusticorum, ibique DD.* But none ever did repute the way controverted a high way. And how might all the heritors of Scotland, lying upon the sea be oppressed, and their lands rendered unprofitable, if upon the pretext of going to burn-mouths within their lands, the lieges could make every bit of their land a road and passage thereto; seeing every time that one came, they might make a new way! *3tio*, As for the acts of Parliament founded on, they have no place here: 1*mo*, Because introduced only in favours of dry burghs that want harbours, such as Lithgow for Borrowstowness; whereas Innerkeythin lies on the sea, and hath one of the best and safest harbours of Scotland, and wherewith they boast all the country. As for Fordell, or the rest of the pursuers, the act is not conceived for them. *2do*, The acts speak only of ways leading to public ports; in which case we are not, there being no public port here. *3tio*, It gives not burghs liberty to make ways, but only to continue those high-gates whereof they had been formerly in possession; which yet differs our case from those acts extremely. *4to*, As to Fordell's tolerance, the just double thereof produced and bearing its true tenor, is opponed. And to make it appear to your Lordships, that his debarring of thir pursuers from this way and harboury is not in *æmulationem vicini*, but rather that their pursuit is such;—this defender hath upon his vast expence found a coal for the public good of

that country, they would hereby prejudge him of the sale of his coal, to enhance the price of their own; and as it would not be esteemed malice in Fordell to deny this defender a level through his ground to dry his coal with, so the defender hath the same reason to deny him this highway through his land. And it is notourly known, that many gentlemen in Scotland who have coalheughs, are forced to buy the privilege of highways to drive their coals to the sea, as in the case of the *Earl of Mar* and *Sauchie;** which were altogether needless, if this declarator were relevant. That a deed is never supposed *in æmulationem, ubi fit ut principaliter agenti prosit, non ut alteri noceat; et animus nocendi non presumitur.* And I do no wrong when I refuse you that which I am not bound to give you; for *alteri prodesse ad liberalitatem non ad justitiam pertinet.* And Fordell will have no prejudice, seeing he may caw his coals (as usually he does) to Innerkeithine, whereto he has a public uncontroverted high way, being almost as near as Aberdour burn-mouth, and on many accounts more commodious.

TRIPLIED, for the pursuer,—Where it is alleged to be but *privata statio*, it is offered to be proven that it has been commonly reputed and esteemed, past all memory of man, a public port, to which ships and boats within the country, and from foreign places, as Norway, &c. usually repair; and that the King's customers exacted custom thereat; and that Aberdour and Innerkeithing have been in use to repair the said harbourey, and put in rings to fasten ships; and that ships of good burden with meson sail may come up in it, and lie there at anchor, and be secure; and that they and all the country about have been in use, past memory, to load and unload their goods thereat, and for that effect there are two convenient piers built at the same. Which, as they are unanswerable and most pregnant qualifications of a public harbour, so, if need be, it is farther offered to be proven, that this was the station and port which of old appertained to the abbacy of Inchcolme, and was the place whereat the monks and their provisions were wafted out and in, and was common to all the feuars of the abbacy: and consequently cannot be appropriated now upon a private humour by Cuthlehill, whose predecessors, Stuart of Maynes, got a small feu of some fifteen acres from the Earl of Murray, in King James the 6th his time, as lord of the erection of that abbacy; nor can the rest of the feuars be debarred, or any who possessed and frequented that harbour before the so recent feuing of these lands of Cuthlehill, which in effect was all the lieges who pleased to resort thither. As to the way, it is replied, *1mo*, They need say no more for their right to it, save that [it] leads to a public port and harbourey, and so, without a gross impeaching of the acts of Parliament, none can stop it. *2do*, Whatever it be, whether *iter actus* or *via*, they have prescribed by possession and custom of going that way, past all memory, uninterrupted, a passage for horse and loads; and they contend *id tantum præscriptum quantum possessum.*

QUADRUPLIED,—All the qualifications adduced do not amount to make a public harbourey; but there must be ever an erection, seeing a general disposition will not carry it, nor yet the adjection of pertinents, it being *inter regalia.* As to the pretence that it was the harbourey of Inchcolme, it is most false; seeing there is another creek, near a mile shorter way, which was their common port,

* See it at the *26th of December*, 1665, beside me. See also M'Keinzie's Pleadings, *Haynig* and *Town of Berwick.*

and where there is yet an artificial cove that evinces the same. As to [the] second, about the way, that it must follow, because *ducit ad locum publicum*; that is *petere principium*, seeing there is no public harbour here; for then it behoved to be notorious known to all the country about, and controverted by none, and judged by seamen (and not by two mean obscure witnesses, who know not what a public port is, as not falling *sub sensus*,) for such; nothing of all which is here, but a pitiful burn-mouth, never holden for one; else all the strips in Scotland, where they degorge into the sea, should as well deserve that denomination.

The Lords, before answer to this debate, ordained witnesses to be examined for either parties upon thir points, viz. Whether the way in question has been reputed and holden a common high way; and how long; and, if not a public way, then how long the pursuer hath been in use to pass that way with horse and loads, and if he hath any constitution of a servitude: and also ordained the pursuer to prove in what way and manner the said harboury has been reputed and holden a public port, and how it was made use of by the pursuers, or if they prove it such by an infeftment erecting it; and ordained the defender to prove his own and his author's deeds of interruptions and the acknowledgments he got for granting licences to others to go that way: and nominated the Lords Abbotshall and Preston to go and visit the ground, and receive the depositions of the witnesses, in the Yule vacance approaching: which they accordingly did.

Thir depositions falling to be advised on the 13th of June, 1673, and the parties called, much of the former debate was resumed. Likeas, it was added, that any immemorial possession Fordell's witnesses had deponed that he, his tenants, or coalcawers, had through this way to the said harbour, could not be respected to constitute this grievous and odious servitude upon his lands; 1*mo*, Because obscure fellows, practised and drunken on, so that three of them died within some few days after; and cannot prove forty years above the interruptions, which are proven twenty years back. 2*do*, Mr. Robert's authors were sundry of these years minors, and so must cut off many off their prescription; and which he must be allowed to prove, being only in an act before answer. 3*tio*, All they depone is, they ever saw them drive horses and coals that way: which is very consistent with Mr. Robert's allegeance, that they did it by tolerance upon the payment of acknowledgments; and whereof the witnesses either might be ignorant, or make no mention of it, being ignorant country people, and not specially interrogated on it. 4*to*, No presumption could run against Maynes, the defender's author, because absent in Orkney the great part of all that time their possession is proven, and which has been *vi clam vel precario*, or by negligence of servants. And such odious prescriptions ought only to run *sciente et præsente domino*; which was not; at least the common law allows upon most solid and excellent reason, twice as much time to prescriptions *inter absentes* as *inter presentes*, viz. 20 *anni* to the one and but 10 to the other.

The Lords found the tolerance produced by the defender a formal constitution of a servitude; and therefore declared Fordell in right thereof might carry his coals through the said way to the burn-mouth, without any molestation to be made to him by the defender; reserving always to the defender what grounds he had in law for quarrelling the said tolerance by prior inhibitions or otherwise. And in regard the witnesses adduced for the defender did not depone upon the precise time of the interruptions backward, so that it did not appear if there was forty years above the interruptions peaceably prescribed; therefore, they ordained

those witnesses to be re-examined as to that part; their depositions being to lie *in retentis*, to be considered and advised by the Lords, in case the defender shall annul that tolerance granted by his author to Fordell.

This interlocutor surprised both parties: though it was most favourable to the defender; for we never dreamed the Lords should have run to the tolerance, which, as it was not founded on by the pursuer, so it was only produced by the defender to demonstrate that if Fordell had a right to go that way, he would never have accepted that tolerance; and though we knew it to be a clear constitution of a servitude upon the lands, yet we regarded not that, because we had a reduction of it *ex capite inhibitionis*, and which was come that length that we had nothing to crave save a certification against it, for no production; which, when we sought next day, my Lord Craigie being Ordinary, and no friend of Cuthlehill's, he downright refused the same, upon that ground of law, *quod semel approbasti non licet amplius reprobare. (L. 4. D. de Legatis, 2do.)* And after much reclaiming and difficulty, he was content to give Cuthlehill the Lords' answer on it; and thought to have haughed him, had he not taken up his process till a better opportunity should offer; at which Craigie stormed.

Then Fordell stirred up the town of Innerkeythin against him, who were owned by Halton. To whom it was ANSWERED, that the Lords could determine nothing in their favours, as they craved, seeing there were no witnesses led upon their possession; likeas, they had passed from their compearance, and caused eraze all their part of the debate out of the minutes, and now did only produce a charter from King William, giving them all the customs for twenty-two miles in Fife, from Tillibody or Divan water to Levin bridge; and by which they say they reached Dysert and Weimes, after a most litigious debate, and now must have right to this harbour at Aberdour. Which charter signifies nothing to the point in hand, which is not about customs, but about a high-way and public harbour. *2do*, It is a general grant, and contained in a charter of confirmation, without seeing that which is confirmed, and can give them no right: neither have they apprehended possession by virtue of it, either as to this or the most part of the other stations within the said bounds. *3tio*, The said grant can neither in sense nor reason extend any farther than to such as were public ports at that time, and cannot be understood to give away all those which have been since, or may be now made commodious stations; else it were very ridiculous to think they have right to every creek and burn-mouth in all the gentlemen's lands within the said bounds.

I think the Lords did nothing upon Innerkeything's interest.

When this failed, then Fordell gave in a bill, craving the Lords would advise his witnesses' depositions, and find his immemorial possession either proven or not proven as they should see cause: and that their re-examining the defender's witnesses would be but in vain and to no purpose, seeing, by reason of their age, none of them could depone upon older interruptions than twenty years; and he humbly conceived forty years above that was proven. And Fordell made so great moyen, that, though the President was most averse, yet he got it re-advised: and, without allowing any new diligence for re-examining some of the witneses, they, upon the probation before them, found forty years' possession beyond the first interuptions proven; yet they cautioned it so, that he should allenarly have a foot-road that way: as also, they found nothing as to the harbour, whether it was public or private; only Fordell contended, if it was not a pub-

lic station for the good of the country, it ought to be made and declared one now.

After Mr. Robert Weimys had got this stroke, Sir George M'Keinzie came in with two wild notions, and whereof he was so pleased and confident, that he declared they had been blind or mad who had not discovered them till now. The first was, that the forty years' prescription of heritable rights and servitudes not being known nor received in Scotland till the Parliament 1617, Fordell behoved to begin his computation from that year, and prove forty years' peaceable possession after the same; which he neither had done nor could do, seeing interruptions by casting off of loads was proven in 1652, so that he had only proven thirty-five years' possession. But he never considered that the said 12th Act of Parliament 1617, made the years run before the date of the act, profitable for the prescription, unless within thirteen years after the date of it the parties concerned should use due interruptions; and which Mr. Robert cannot say was done. Likeas, in 1623, *G. Neilsone of Kirkcaffy* pursued the *Sheriff of Galloway* (see it in Dury, 27th June 1623,) for the servitude of a way through his land, and which he founded on immemorial possession of forty years, which years were almost all run before the said act of prescription, and yet the Lords sustained the declarator; which seemed more strange, seeing the thirteen years which were allowed to interrupt were not here expired; unless you will say the same was founded upon the 28th act James III, in 1496, ordaining all writs to prescribe not being followed within forty years; but I think that statute no good ground whereon to have founded that action.

His second fancy and chimera was, that Fordell had not proven his libel; in so far as he offered to prove immemorial possession, and had only proven forty years; whereas there was a great difference betwixt *possessio quadraginta annorum et possessio cujus initii memoria non extat*, this being much longer. I find, indeed the civilians put some difference; see Cæpolla, *tractatu de servitutibus, cap.* 19. *Quomodo constituatur servitus.* And our Craig, p. 68, speaking *de feudo burgagio apud Anglos*, calls immemorial possession *sexaginta annorum.* But as to the point of prescriptions, I observe our law makes no difference at all. Yet he so valued himself upon thir light imaginations, that he would have wagered upon their solidity against any, till he saw the Lords reject them with pity and disdain. Yet in the foresaid decision out of Dury, between Kirkcaffie and the Sheriff of Galloway, the Lords seem to require more than forty years' possession only, for constituting of a servitude of a gait to the kirk, and to call immemorial some different thing.

Advocates' MS. No. 384, *folio* 163.

1673. *February.* SIR JAMES RAMSAY of Whithill, *against* JO. ROBERTSONE.

IN February 1673, the following case fell to be debated and decided, remarkable for its singularity and rarity. Jo. Ramsay having been debtor to the Laird of Airdrie Preston, in 900 merks, he paid the same, and obtains his discharge. Both parties deceasing, one Jo. Robertsone in Craill confirms himself executor-creditor to Airdrie, who was his debtor in the like sum, and presses Sir Ja. Ram-

say of Whythill, as heir to his brother Jo., to pay the said sum to him; who (his brother's papers being then in Holland, and knowing nothing it was paid and discharged already,) accordingly pays it, and takes an assignation thereto: so that the double payment is instructed by writ. At last Sir Ja. discovering his error, did intent an action for condiction and repetition of the said money, both against Robertsone and his cautioner in the testament, and against the representatives of Airdrie, as *indebite solutum* by him.

It was ALLEGED for Robertsone, he could never be liable to refund that money, because *condictio indebiti* was only allowed against him who had got payment where nothing was due to him; but so it is, he was a true and lawful creditor, *et qui suum tantum recepit;* and whoever paid him, *non refert*, seeing he is not in *lucro captando:* and it is certain, that a creditor getting payment even from him who was not his debtor *non tenetur hac condictione indebiti.*

ANSWERED,—It is confessed, that a creditor getting payment from that same person who formerly had paid him that same very sum *non tenetur* to restore it, because it is the payer's fault to forget what he had formerly done, and so ensnare the creditor; as also, for the same reason, a creditor will not be liable if he follow the faith of the payer, and become creditor of new to that person to whom the payment is first made in contemplation of that right which was promised by him who paid it: but here Sir Ja., the second payer, was in no fault, but in invincible ignorance; and it is against reason and the principles of law, *bona fides non patitur ut bis idem exigatur*, that he should not have repayment of his own. *L.* 57 *D. de R. juris, l.* 54 *et* 120 *D. eodem; l.* 59, 62, *et* 153 *D. de Regulis Juris. Quod ipsis qui contraxerunt obstat, et successoribus eorum obstabit. Nemo melioris conditionis esse debet quam author.* 2*do*, The payment was made to Robertsone mainly as executor-creditor, and which is a successorial and representative title: and so being *hæres quoad* that particular, he can have no other right to retain it than what the defunct had, (this being the definition of *hæreditas*, that it is *successio in universum jus quod habuit defunctus tempore mortis;* neither can it be otherwise transmitted than it was in the defunct's person;) but here the defunct had no title at all, his right being utterly extinguished by payment.

REPLIED,—That double payment made by one and the self same man *nulla causa parit condictionem;* and if Robertsone had obtained a sentence against Sir Ja. he could never have been now questioned; and he would have got a sentence, had not he voluntarily paid him; and in effect what was paid was given by way of transaction, which stops all condiction, *L.* 65, *par.* 1*mo*, *D. de condictione indebiti.*

DUPLIED,—That the law is better grounded upon natural equity than to deny condiction to any who by omission hath paid one sum twice. 2*do*, Even where a sum is paid in obedience to a sentence, if he be the heir of the first payer it cannot prejudge him of repetition, nor alter the nature of the thing, to make it *de indebito debitum;* but, on the contrary, the payer should rather have condiction, because his second payment was forced and not voluntary. And that a sentence hinders not *condictio indebiti*, was decided in the case *Pitfoddells* contra *Waterton and other creditors of Jo. Donaldsone;* which see beside me, at the 12th of January 1664, in my register of decreets, it is No. 68. But, whatever the Lords found there, it is contrary to the common law, which hath veneration for a sentence. That *habetur pro veritate*, and at least cannot be refused the force of a na-

tural obligation, which where it exists *impedit hanc condictionem;* and having a power of coaction, cannot but make the thing due: *L.* 1 *C. de condictione indebiti; l.* 6, *p. ult. D. de re judicata; l.* 8 *C. de rebus creditis; l.* 108 *D. de v. significatione.* (*Vide infra, No.* 422, [*Pallat, Stewart, &c. November* 1673;] *and* 508, § 4, [*November* 1676;] *and in June* 1677, *No.* 585.

But we need not jangle any more about this, seeing there is an express text that voids our controversy, viz. *L.* 19, *p.* 1, joined *cum l.* 65, *par. ult. D. d. t. de C. I.* where repetition is competent, albeit the receiver got nothing but what was owing him, if so be it was paid to him upon mistake by one who was not owing it; only there is distinction made by the doctors whether the payer pays it in his own name, thinking himself debtor in it, or in name of another, to wit, of the true debtor; and in the first case allow condiction, and in the last not, *ob l.* 44 *D. hoc t. de C. I.* See the *DD.* upon *Condictio indebiti;* as also Harprecht, *ad* p. 1, *Institut. quibus modis re contrahitur obligatio. Vide l.* 53 *D. de R. juris.*

But whatever be in this, the Lords found the pursuer's action just and well founded in law; and therefore decerned the defender Robertsone, though executor-creditor, *condictione indebiti,* to refund what he had so got.

I believe it would also carry all the intermediate annualrents.

Advocates' MS. No. 385, *folio* 165.

1673. *February.*

IN the same month of February 1673, another extraordinary practique was passed, viz. One who deforced and impeded a messenger in the execution either of a caption or a poinding, is convened by the party employer of the messenger to pay the debt owing to him by his debtor, whom either he rescued, or stopped, without any just ground, his goods from being poinded.

It was ALLEGED, the pursuit was a novelty neither founded upon law nor reason, seeing by our Acts of Parliament, Act 117th in 1581, Act 84th in 1587, and Act 150th in 1592, the pain of deforcement is defined to be the tinsel and escheat of their moveables, and punishment of their person by imprisonment; and penal statutes and actions founded thereupon, cannot be extended to any other punishment than what is expressly determined in the said acts, such as this is.

REPLIED,—The Acts of Parliament, beside the specific pains mentioned, leave the coercition of so great a contempt done to authority at the discretion of the judge, to be intended and stretched further at his arbitriment as he shall see cause. That magistrates are liable for the debt, if rebels once incarcerated escape out of their prisons, though by connivance or negligence; *ergo,* much more ought he who *manu forti* exemes him from lawful authority, or stops the free current of law in executing sentences, wherein there is *dolus et lata culpa,* be liable.

DUPLIED,—That the pain is arbitrary is denied. That magistrates become debtors by the escape arises from an incontroverted custom, *quæ legem imitatur;* but there is no such thing can be subsumed against deforcers. *Erubescimus sine lege loqui.* And the inconvenients are desired to be pondered, if deforcers be made liable, for it may be L. 100,000.

They say the Lords found the libel relevant to fix the whole debt upon the deforcer, the deforcement being proven.

There is no doubt but if the moveables of the deforcer be of so much value as may satisfy the debt but this action is most just, seeing it is but just the same as if he were pursued to be punished by tinsel of his moveables; which, by the said act in 1581, are declared to be *primo loco* liable to the payment and satisfaction of the debt due to the creditor, according to that, *pœnis fiscalibus creditores præferri:* but where his moveables are not sufficient for paying the whole debt, but it exceeds the value of the moveables, in that case I can scarce see how the deforcer in justice can be decerned to pay the sum farther than *ad concurrentem quantitatem* with his moveables, *nam pœnæ non sunt ampliandæ.* I find it near decided in Dury, *25th July* 1633, *Mitchell* against *Law. Vide infra, in June* 1677, No. 579, § 7, *anent a Messenger.* I find an action of the same nature was intented before English judges, by *Hary Hope* against *Clackmannan;* (see it beside me at the 6th of November 1658;) but they waved to determine it. But I think, in this case, where he pays the debt, he ought in equity to be free of all other punishment; seeing where a crime is punished by several pains set down in sundry Acts of Parliament, which acts do not derogate one from another expressly, it is in the option of the judge to punish the delinquent by either of them; *L. Quoties,* 41 *D. de obligationibus et actionibus: et in dubio mitior est imponenda,* and that which is most used, *l.* 42 *D. de Pœnis et l.* 9 *D. ad R. Juris, ibique Bronchorstius;* but then *una consumit alteram;* after election made he cannot recur to make use of any of the other: *L. Senatus,* 14 *D. De accusationibus.—Vide legem* 53 *Digestorum, De Obligationibus et Actionibus.—Vide* Harprechtum *ad par.* 10 *Inst. de injuriis, num.* 5 *et seq. item num.* 59 *et seq. Vide* Hipolitum de Marsiliis, *singulari* 137, 366; *item in tractatu suo de fidejussoribus, numero* 16 *et seq. Vide Vigelii methodum juris, libro* 2, *cap.* 9, *pag.* 148. But there may be some doubt here: because where the law hath introduced two sundry actions for one crime, whereof the one is civil and the other criminal; the one doth not exhaust nor extinguish the other, they being *genere* different, and not *ad idem;* but *ita est,* this action against the deforcer for payment is merely civil; *ergo,* I observe, *ex l.* 3 *C. de Exactoribus Tributorum, lib.* 10. that the deforcer of an apparitor, and he who exemes a debtor out of his hands, is made liable for the whole debt; only that law speaks in the case where the party exemed is debtor both to the fisk and to private persons; though I see no great cause of disparity why it may not hold true in the general, seeing it is like the Emperor by his prescrip determines only the particular case wherein he was then consulted. See M'Keinzie's Criminals, at the title Deforcement. *Vide l.* 4 *C. de custodia reorum.* The titles of the *ff. Ne quis eum qui in jus vocatus est vi eximat,* and *De eo per quem factum erit quominus quis in judicio se sistat,* seem to have some affinity with the matter of deforcements. *Vide statuta Willelmi, cap.* 4. *et statuta* 2 *Roberti* I. *cap.* 20.

Advocates' MS. No. 386, *folio* 166.

Stanford Law Library
3 6105 063 118 090